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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1370

DENNIS COATES, ET AL.,

Appellants,

v.

CITY OF CINCINNATI,

Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO

RELEVANT DOCKET ENTRIES

Hamilton County Municipal Court

(Cincinnati Municipal Court)

12- 2-67	(Coates) Case called for trial — continued
3-29-68	(Coates) Finding of guilty
4-12-68	(Hastings, Saylor, Adams and Wyner) Cases called for trial — continued
4-23-68	(Hastings, Saylor, Adams and Wyner) Finding of guilty
9-20-68	(Coates, Hastings, Saylor, Adams and Wyner) New Trial Motions overruled
9-30-68	(All Defendants) Notices of Appeal filed

Court of Appeals

First Appellate District of Ohio

11-13-69	Assignments of Error and Appellants' Brief filed
12- 9-68	Brief of Appellee filed
2- 4-69	Convictions affirmed
2-11-69	Notice of Appeal filed
4-30-69	Order to Certify Record to Supreme Court of Ohio

The Supreme Court of Ohio

4-30-69	Motion to Certify Record allowed
9-24-69	Hearing on the merits
1-28-70	Convictions affirmed
2-16-70	Notice of Appeal filed

RELEVANT PLEADING, CHARGE, FINDING OR OPINION

Arrest Affidavit as to Dennis Coates, 12-8-67

AFFIDAVIT

The Cincinnati Municipal Court

STATE OF OHIO)
HAMILTON COUNTY) SS.
CITY OF CINCINNATI)

Thomas J. Martin, being first duly cautioned and sworn, deposeth and said that one DENNIS COATES on or about the ..... day of DEC 7 1967, A.D. 19 .... at and in the City of Cincinnati, County of Hamilton, and State of Ohio, did Unlawfully Loiter on the sidewalk at 500 Main with 6 other persons and there did conduct himself in a manner annoying to persons passing by, Contrary to and in violation of Section 901-L6 of the code of Ordinances of the City of Cincinnati.

Sworn to and subscribed before me and filed in this court this .... day of DEC 8 1967 A.D., 19....

/s/ Thomas J. Martin

ROBERT D. JENNINGS
Clerk of the Cincinnati Municipal Court

By /s/ J. V. Huber
Deputy Clerk

5

Warrant for arrest — Coates, 12-8-67

WARRANT

The Cincinnati Municipal Court

STATE OF OHIO)
HAMILTON COUNTY) SS.
CITY OF CINCINNATI)

To The Police Chief of the City of Cincinnati, Greetings:

You are commanded to take the body of DENNIS COATES, P. O. Box 382 Harper Washington, and have him before the Honorable Judge of the Cincinnati Municipal Court forthwith to answer unto THE CITY OF CINCINNATI charged with LOITERING, Section 901-L6 Code of Ordinances as per affidavit hereto attached and of this writ make legal service and due return.

Given under my hand and seal this .... day of DEC 8 1967 A.D. 19.....

Name and address of affiant:

ROBERT D. JENNINGS,
Clerk of the Cincinnati Municipal Court

By /s/ J. V. Huber
Deputy Clerk

Arrest Affidavit as to James Hastings, 4-11-68
(Saylor, Adams and Wyner proceedings identical)

AFFIDAVIT

Hamilton County Municipal Court

STATE OF OHIO)
HAMILTON COUNTY) SS.
CITY OF CINCINNATI)

Pat'n Hochstrasser being first duly cautioned and sworn, deposes and says that James Hastings being one of a group of more than two persons assembled on the sidewalk on or about April 11, 1968, at and in the City of Cincinnati, Hamilton County and State of Ohio, did unlawfully conduct himself in a manner annoying to persons passing by contrary to and in violation of Section 901-L6 of the Code of Ordinances of the City of Cincinnati.

Sworn to, subscribed before me, and filed in this Court this April 11, 1968

/s/ Pat'n Hochstrasser

ROBERT D. JENNINGS, CLERK
Clerk of the Hamilton County Municipal Court

By /s/ Peter Busse
Deputy Clerk

Warrant for arrest — Hastings, 4-11-68
(Saylor, Adams and Wyner proceedings identical)

WARRANT

HAMILTON COUNTY MUNICIPAL COURT

STATE OF OHIO)
HAMILTON COUNTY) SS.
CITY OF CINCINNATI)

To the Police Chief of the City of Cincinnati, Greetings:

You are commanded to take the body of JAMES HASTINGS and have him before the Honorable Judge of the Hamilton County Municipal Court forthwith to answer unto the City of Cincinnati, charged with the violation of Section 901-L6 of the Code of Ordinances of the City of Cincinnati, and of this writ make legal service and due return. Affidavit on the reverse side of this warrant is, by reference, made a part hereof.

Given under my hand and seal this April 11, 1968.

ROBERT D. JENNINGS
Clerk of the Hamilton County Municipal Court

By /s/ Peter Busse
Deputy Clerk

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[66] CITY OF CINCINNATI, APPELLEE, *v.* COATES, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* HASTINGS, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* SAYLOR, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* ADAMS, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* WYNER, APPELLANT.

[Cite as Cincinnati v. Coates, 21 Ohio St. 2d 66.]

Criminal law—Ordinance prohibiting assemblage on sidewalks annoying persons passing by—Not vague or uncertain—Sufficiency of affidavit charging offense.

A city ordinance making it "unlawful for three or more persons to assemble * * * on * * * sidewalks * * * and there conduct themselves in a manner annoying to persons passing by" is not vague or uncertain but is, on its face, sufficiently clear to inform a person of common intelligence of the nature of the acts prohibited by the ordinance.

[67] (Nos. 69-116, 69-117, 69-118, 69-119 and 69-120—Decided January 28, 1970.)

APPEALS from the Court of Appeals for Hamilton County.

Mr. William A. McClain, city solicitor, *Mr. Ralph E. Cors* and *Mr. A. David Nichols*, for appellee.

Messrs. Beckman, Lavercombe, Fox & Weil and *Mr. Bernard C. Fox*, for appellants.

CORRIGAN, J. We are without the advantage of a bill of exceptions in these appeals from convictions in the Hamilton County Municipal Court for violating Section 901-L6 of the Cincinnati Code of Ordinances. The Court

of Appeals for Hamilton County affirmed the convictions, and the causes are before this court pursuant to the allowance of motions to certify the record.

The ordinance in question provides:

"It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both."

With one exception, the separate affidavits upon which the warrants of arrest were based charged that each defendant "being one of a group of more than two persons assembled on the sidewalk on or about April 11, 1968, at and in the city of Cincinnati, Hamilton County and state of Ohio, did unlawfully conduct himself in a manner annoying to persons passing by contrary to and in violation of Section 901-L6 of the Code of Ordinances of the City of Cincinnati."

In case No. 69-116, the affidavit charged defendant "on Dec. 7, 1967, did unlawfully loiter on the sidewalk at [68] 500 Main with 6 other persons and there did conduct himself in a manner annoying to persons passing by * * *."

We are urged to declare this ordinance to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and Section 3, Article I of the Ohio Constitution, for the reasons that it is vague and imprecise as to what conduct is proscribed. A claim is also made that the affidavits do not contain all the material elements to charge an offense under said ordinance.

The First Amendment to the U. S. Constitution provides, in part:

"Congress shall make no law * * * abridging * * * the right of the people to peaceably assemble * * *."

This right of assembly, granted by both state and federal constitutions, contemplates that it be asserted and enjoyed in a peaceable manner. The right delineated certainly does not include the contravening of other rights of other persons. The affidavits under scrutiny here charge assembly and a course of conduct "* * * annoying to persons passing by * * *." Without a bill of exceptions we do not know what the conduct was which was considered annoying.

Could it have been the interruping or interfering with the free, unimpeded passage, the use of and enjoyment of the public sidewalk or street by other persons?

Could it have been an intrusion upon the privacy of persons using the public sidewalk or street by accosting and seeking to deliver to such person written or printed messages, papers, pamphlets, cards or books?

Could it have been an intrusion upon the privacy of persons to impart an oral message by blocking or otherwise seeking to detain persons in the free use of the public sidewalks or streets?

On the state of the record before us, we will go to our rewards without knowing.

[69] As to the contention that this ordinance is imprecise, vague and indefinite, we do not agree. Certainly, crime must be defined with certainty and definiteness, which requirements are elements of due process. Persons charged with violations of penal statutes or ordinances are not required to speculate as to the meaning of such legislation. If the provisions of an ordinance are so vague that persons of common intelligence must guess as to their meaning, then an essential of due process is lacking. *Connally* v. *General Construction Co.*, 269 U. S. 385.

The ordinance prohibits, *inter alia*, "conduct * * * annoying to persons passing by." The word "annoying" is a widely used and well understood word; it is not necessary to guess its meaning. "Annoying" is the present participle of the transitive verb "annoy" which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.

We conclude, as did the Supreme Court of the United States in *Cameron* v. *Johnson*, 390 U. S. 611, 616, in which the issue of the vagueness of a statute was presented, that the ordinance "clearly and precisely delineates its reach in words of common understanding. It is a 'precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be * * * proscribed."

Although we conclude that the meaning of the words used in the ordinance is clear and that the standard of conduct which it specifies is not dependent upon each complainant's sensitivity, we are unable to apply it to the facts in this case because of the absence of facts in the record before us.

We find no merit in defendants' claim that the affidavits herein do not contain all the material elements to charge an offense under this ordinance.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

TAFT, C. J., MATTHIAS and SCHNEIDER, JJ., concur.
O'NEILL, HERBERT and DUNCAN, JJ., dissent.

[70] HERBERT, J., dissenting. There being no bill of exceptions in these cases, the sole and proper question raised by these appeals is the constitutionality, on its face, of Section 901-L6 of the Cincinnati Code of Ordinances. It

appears to be well established that the question of the constitutionality of a statute or ordinance is judicially cognizable under these circumstances. *Belden* v. *Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N. E. 2d 629; *Blacker* v. *Wiethe* (1968), 16 Ohio St. 2d 65, 242 N. E. 2d 655. *Cf. Castle* v. *Mason* (1915), 91 Ohio St. 296, 110 N. E. 463; *State ex rel. Herbert,* v. *Ferguson* (1944), 142 Ohio St. 496, 52 N. E. 2d 980; *State ex rel. Speeth,* v. *Carney* (1955), 163 Ohio St. 159, 126 N. E. 2d 449.

Defendants were convicted of violating Section 901-L6 of the Cincinnati Code of Ordinances, which provides:

"It shall be unlawful for three or more persons to assemble, *except at a public meeting of citizens,* on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00) or be imprisoned not less than one (1) nor more than thirty (30) days or both." (Emphasis added).

Since the syllabus announced by the majority does not contain all of the pertinent language of the ordinance under consideration, I am respectfully constrained to characterize it as dicta. Therefore, this dissent should not be construed as necessarily encompassing that syllabus.

The defendants claim that the ordinance violates the Constitution of the United States in that it is vague, indefinite and imprecise as to what conduct is prohibited.

The United States Supreme Court, in the case of *United States* v. *Petrillo* (1947), 332 U. S. 1, 91 L. Ed. 1877, stated that while the Constitution of the United States does not require impossible standards of certainty in statutes defining crimes, the test is whether or not the law is so designed that persons of ordinary intelligence, who would

be law abiding, can determine with reasonable precision [71] what conduct it is their duty to avoid. *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 70 L. Ed. 322; *Cramp* v. *Board of Public Instruction* (1961), 368 U. S. 278, 7 L. Ed. 2d 285; *Winters* v. *New York* (1948), 333 U. S. 507, 92 L. Ed. 840. The rule is also well settled that penal laws must be strictly construed and are to be interpreted strictly against the state and liberally in favor of the accused. See *Mentor* v. *Giordano* (1967), 9 Ohio St. 2d 140, 224 N. E. 2d 343; *State* v. *Conley* (1947), 147 Ohio St. 351, 71 N. E. 2d 275; *State* v. *Meyers* (1897), 56 Ohio St. 340, 47 N. E. 138; *Turner* v. *State* (1853), 1 Ohio St. 422; *Hirn* v. *State* (1852), 1 Ohio St. 15.

Reading the instant ordinance in accordance with those rules of construction, and even assuming that what will constitute "annoying" conduct is sufficiently definite so as to be reasonably understood by all men who would be law abiding citizens, it is apparent that conduct which, in fact, is "annoying," is not unlawful if it is conduct at a "public meeting of citizen." Thus, the threshold question before us should be whether the ordinance is sufficiently definite and precise to inform a group of three or more citizens that their particular gathering is or is not such a "meeting" and, hence, is or is not excepted from the operation of the ordinance.

There appears to be little doubt that the language, "except at a public meeting of citizens," was written into the ordinance to offset potential claims that the ordinance affronted the constitutional right of peaceful assembly. The United States Supreme Court has spoken often in this area and has declared that stricter standards of permissible statutory vagueness should be applied to any statute or ordinance which has a potentially inhibiting effect upon rights guaranteed by the First Amendment to the Con-

stitution of the United States. *Smith* v. *California* (1959), 361 U. S. 147, 4 L. Ed. 2d 205; *Cramp* v. *Board of Public Instruction, supra* (368 U. S. 278); *Winters* v. *New York, supra* (333 U. S. 507); *Thornhill* v. *Alabama,* (1940), 310 U. S. 88, 84 L. Ed. 1093; *Scull* v. *Virginia, ex rel. Committee on Law Reform and Racial Activities* (1959), 359 U. S. 344, [72] 3 L. Ed. 2d 865; *Stromberg* v. *California* (1931), 283 U. S. 359, 75 L. Ed. 1117; *Wright* v. *Georgia* (1963), 373 U. S. 284, 10 L. Ed. 2d 349. In those cases, the United States Supreme Court was concerned with "the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications of the statute." *Wright* v. *Georgia, supra,* 292.

Even if it is assumed that conduct which is reasonably calculated to be "annoying" is well known to reasonable men who would be law abiding citizens, the ordinance nevertheless fails to define the boundary between that assemblage which will constitute a "public meeting of citizens" and that which will not be considered such a meeting. For example, do only groups which have licenses constitute a public meeting? Must some form of notice be given before a meeting may be considered a public meeting? Who may convene a public meeting? Is a public meeting one held only in a public place? Must a meeting be held during certain hours in order to be "public"? May a public meeting be called only for certain purposes? Is it clear that an assemblage of three or more citizens on a public sidewalk can not constitute a public meeting of those citizens? In short, although the ordinance clearly excepts "annoying" behavior "at a public meeting

of citizens" there is no indication as to what conduct was included in the very words which announce that exception.

In my opinion, where an ordinance inflicts a criminal penalty for certain conduct, but excepts such conduct from its operation under certain circumstances, both the proscribed conduct and the excepting circumstances must be designated with sufficient precision to meet constitutional requirements regarding vagueness and uncertainty. The failure of the ordinance under consideration to meet this test renders it unconstitutional on its face.

DUNCAN, J., concurs in the foregoing dissenting opinion.

JUDGMENT, ORDER OR DECISION IN QUESTION

Final Order, Ohio Supreme Court

THE SUPREME COURT OF THE STATE OF OHIO

1970 TERM

To wit: January 28, 1970

Nos. 69-116, 69-117, 69-118, 69-119 and 69-120

THE STATE OF OHIO,
City of Columbus.

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

DENNIS COATES,
JAMES HASTINGS,
WENDELL SAYLOR,
ARNOLD ADAMS, and
CLIFFORD WYNER,
Defendants-Appellants.

APPEALS FROM THE COURT OF APPEALS
for HAMILTON *County*

These causes, here on appeals from the Court of Appeals for Hamilton County, were heard in the manner

prescribed by law. On consideration thereof, the judgments of the Court of Appeals are affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the CINCINNATI MUNICIPAL COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 28 day of January 1970.

/s/ .....Clerk
/s/ .....Deputy

OTHER PARTS OF THE RECORD

Transcript re: Coates

HAMILTON COUNTY MUNICIPAL COURT

STATE OF OHIO

(TITLE OMITTED)

BILL OF EXCEPTIONS

BE IT REMEMBERED that upon the trial of this cause commencing on March 27, 1968 before the Honorable Rupert A. Doan and continuing on March 29, 1968 before the Honorable Joseph A. Luebbers, Judges of the Hamilton County Municipal Court, the following proceedings were had:

APPEARANCES:

On behalf of Plaintiff:

Norbert A. Nadel, Esq.
Assistant City Prosecutor
(Hearing March 27, 1968)

A. David Nichols, Esq.
Assistant City Prosecutor
(Hearing March 29, 1968)

On behalf of Defendant:

Bernard C. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

[2] MARCH 27, 1968
10:30 A.M.

MR. NADEL: This is City of Cincinnati vs. Dennis Coates and all witnesses, Your Honor.

THE COURT: As I understand, you are not ready to proceed to trial?

MR. NADEL: That's right.

THE COURT: But Mr. Fox has matters to present to the Court?

MR. NADEL: That is correct, Your Honor.

THE COURT: That we will consider now. All right.

MR. FOX: First off, I'd like to make an oral motion to dismiss on the basis that the ordinance in question violates the First Amendment of the United States Constitution, and Section 3, Article I of the Ohio Constitution, Due Process, and the Fourteenth Amendment of the United States Constitution. I'll just briefly give you a couple of cases that I have.

(Argument by Mr. Fox and Mr. Nadel, and the Court then took the motion to dismiss under submission pending handing down of a ruling in a similar case now pending before an appeal court.)

MR. FOX: I'd like to file a motion to quash [3] also which raises a different point, and maybe I'm the eternal optimist; maybe the Court will rule in my favor on this. We are moving to quash on the basis that the affidavit doesn't charge any violation of any ordinance of the City of Cincinnati, whether it's constitutional or otherwise (handing document to the Court.)

(Counsel for defendant discussed the motion to quash with the Court, following which the Court overruled the motion.)

MR. FOX: If I can bother you once more, I'll file a demurrer because I'm never sure which you should file,

a motion to quash or a demurrer (handing document to Court.)

(Counsel for defendant discussed the demurrer with the Court, following which the Court overruled the demurrer.)

THE COURT: Then, as I understand it, Friday we will proceed with the testimony, proceed with the trial, and we will withhold the matter of your motion and withhold the matter of the decision, if it should get to that point, the decision on the merits of the case.

(Thereupon the trial was adjourned until Friday, March 29, 1968, at 9:00 A.M.)

[4] And thereafter, on FRIDAY, MARCH 29, 1968, before the HONORABLE JOSEPH A. LUEBBERS, one of the Judges of the Cincinnati Municipal Court, the above-captioned matter came on for trial on the affidavit of Officer Thomas J. Martin, charging violation of Section 901-L6 of the Ordinance of the City of Cincinnati.

APPEARANCES:

On behalf of Plaintiff:
A. David Nichols, Esq.
Assistant City Prosecutor

On behalf of Defendant:
Bernard J. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

THE COURT: Do I understand this is a short case, Mr. Fox?

MR. FOX: That's what I am told.

THE COURT: We usually take those at the end of the

docket, so will do that this morning, to be sure, because we have some other matters.

MR. FOX: No dispute over the facts, as far as I know.

THE COURT: How many witnesses?

[5] MR. FOX: I have only one defendant; I doubt I will call him, unless something surprises me.

MR. NICHOLS: We have four witnesses.

MR. FOX: I assume they will be substantially the same.

THE COURT: Let's proceed.

MR. NICHOLS: What is the plea?

MR. FOX: I am going to renew my motion, I think I will renew them, just briefly.

THE COURT: What is the charge here?

MR. NICHOLS: Charge under 901-L6, loitering section of the City Ordinances.

MR. FOX: Before proceeding with the testimony, I want to renew first my motion to dismiss, on the grounds that the ordinance itself is unconstitutional, violates the Fourteenth Amendment and the First Amendment to the United States Constitution and the Ohio Constitution, Section 2 of Article III.

I am not going to argue the question before the Court, in view of the Lathan Johnson case I would suggest this motion be taken under submission until that's decided; they are going to argue that within a matter of a couple of weeks.

MR. NICHOLS: In fact, the specific motions on this specific case, as set out by Mr. Fox, I understand have [6] already been before Judge Doan of the Municipal Court; is that right?

MR. FOX: That's right.

MR. NICHOLS: Therefore I think the motions should

be in abeyance at this time inasmuch as he already has the jurisdiction.

THE COURT: The motion in this case?

MR. NICHOLS: Yes.

MR. FOX: He has not decided it, so I want to renew it.

THE COURT: He has not ruled on the motion?

MR. FOX: He said he would hold it in abeyance until the Court of Appeals decides. I suggest we do the same.

THE COURT: We will do the same.

MR. FOX: I also filed a motion to quash on the basis the affidavit does not state a crime. The particular statute involved prescribes assembling with three or more persons, and the affidavit says that Coates did unlawfully loiter on the sidewalk. Now, loitering and assembling are not synonomous.

(Argument by Mr. Fox)

THE COURT: What do you have to say, Mr. Nichols?

[7] MR. NICHOLS: Your Honor, with regard to the motion to quash, I believe that was also before Judge Doan in this same manner. At that time I believe it was overruled, Your Honor.

MR. FOX: I think that's right.

THE COURT: Let's see the affidavit. (The Court examined the affidavit.)

MR. NICHOLS: I would say, Your Honor, inasmuch as the motion has been before one member of the Municipal Bench, that he has already ruled, that brings to conclusion the question, and it is a final order. Under the circumstances, the question in this case from which Mr. Fox on behalf of the defendant may appeal therefore is moot, as appears now, other than for his purposes for the record.

MR. FOX: I just want to be sure it is in.

THE COURT: I presume it is made for the purpose of the record. Based on that, I don't think I have to rule on it at all, it's been ruled on.

MR. FOX: I want to be sure.

THE COURT: All right. Well, so then it's already been overruled.

MR. NICHOLS: If I may, Your Honor, is this not a correct statement, Mr. Fox — that the motions have already been ruled on?

[8] MR. FOX: Yes, there is no question about that. I never know what is going to happen in the Court of Appeals, and we will raise it here, they may say I should have.

THE COURT: For the purpose of the record, let the record show in the previous hearing this motion was overruled.

MR. FOX: That's all the motions I have.

THE COURT: All right.

MR. FOX: Is it my understanding, Your Honor, you are following this determination by Judge Doan and in all previous matters in regard to the motion?

THE COURT: That's right, exactly right.

MR. NICHOLS: What is the plea?

MR. FOX: Not guilty.

THE COURT: Not guilty. Raise your right hands to be sworn.

(All witnesses sworn.)

THE COURT: Is there a jury waiver?

MR. FOX: Yes, I have one (handing jury waiver to the Court.)

THE COURT: All right, Mr. Coates, you want the jury waived, and you want the case to be heard here by the Court, is that correct?

THE DEFENDANT: Yes.

(Testimony offered on behalf of plaintiff.)

[9] THE COURT: You have evidence?

(Argument by Mr. Fox and by Mr. Nichols.)

THE COURT: The finding of the Court is guilty. Ever been arrested before?

THE DEFENDANT: No.

THE COURT: What do you do?

THE DEFENDANT: I am a student.

(Further questioning by the Court.)

THE COURT: Anything further, Counselor?

MR. FOX: How is the Court going to proceed? Are you going to overrule the motion to dismiss or are you going to hold the whole thing in abeyance and come back for sentence? It might be just as well to overrule it even though it is submitted to Judge Doan, to overrule our new motion to dismiss, get the sentencing and everything out of the way. We are going to appeal.

THE COURT: I think that might be the —

MR. FOX: Rather than come back and forth.

THE COURT: As long as you are going to, I think that's the better way, too, otherwise it is just going to delay it and muddy up the waters.

MR. FOX: Let me say something further about Mr. Coates. (Statement of Mr. Fox)

THE COURT: The Court feels that there is no [10] objection to demonstration as long as it confines itself within the scope of the law, and this did not.

MR. FOX: Well, I agree it might violate some of these, but not the one —

THE COURT: It is the sentence of the Court $50.00 and costs, one year's probationary, informal probationary period. Any kind of difficulty within the year would be violation of your probation, it means you come back here and be subject to thirty days in the workhouse.

MR. FOX: May we have a stay at this time?
THE COURT: How long do you need? Thirty days?
MR. FOX: I guess that gives me enough time.
THE COURT: The 29th — same bond.

AND THE FOREGOING WAS ALL OF THE PROCEEDINGS RELATIVE TO THE MOTIONS OF THE DEFENDANT PRESENTED AT THE HEARINGS OF THE WITHIN CAUSE.

(CERTIFICATE OMITTED)

STATE OF OHIO

HAMILTON COUNTY MUNICIPAL COURT

(TITLE OMITTED)

BILL OF EXCEPTIONS

BE IT REMEMBERED that on Tuesday, April 23, 1968, at 9:45 A.M., before the Honorable Joseph A. Luebbers, one of the Judges of the Hamilton County Municipal Court, the above-captioned cases came on for trial.

APPEARANCES:

On behalf of Plaintiff:
Wallace Holzman, Esq.
Assistant City Prosecutor

On behalf of Defendants:
Bernard C. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

[2] MR. HOLZMAN: There is a jury waiver and withdrawal of demand for jury, and all of the defendants have been advised of their constitutional rights, but they have decided to waive their rights to trial by jury and have the Court hear the facts and determine the issues of law. Mr. Fox, what is the plea?

MR. FOX: I will make a motion first, to dismiss. I want to raise the constitutionality of the ordinance. I have argued it to the Court before, Your Honor; it is on appeal and will be argued in the Court of Appeals in June,

and I don't think it is necessary for me to cite the usual authorities and all that.

THE COURT: No; they may be added in the record, if you would like. The motion will be overruled.

MR. FOX: The plea is not guilty.

MR. HOLZMAN: The plea is not guilty. Will all witnesses please come forward and be sworn.

(Thereupon the plaintiff presented its evidence.)

MR. HOLZMAN: We rest, Your Honor.

MR. FOX: I move to dismiss.

(Argument by Mr. Fox in support of motion and by Mr. Holzman in opposition to motion.)

THE COURT: The motion will be overruled.

(Thereupon the defendants presented their evidence.)

[3] MR. HOLZMAN: I will waive opening or closing argument.

(Further argument by Mr. Fox and Mr. Holzman.)

THE COURT: It is true in picketing probably that could be annoying to some people along the way, and in all probability it is, but that in itself does not bring it within the scope of any of the ordinances, because it happens to annoy someone. However, when you are blocking either an occupant of the building or someone trying to get in, that's a different situation, and if they ask you to move and say "Don't block the truck," then, of course, you should move and continue your picketing after the truck has either entered or departed.

The finding of the Court is guilty. Costs on each.

MR. FOX: May we have a stay?

THE COURT: Sure.

MR. FOX: Thirty days?

THE COURT: All right.

MR. FOX: I think there is a bond here.

THE COURT: 5/23, same bond, if there is one. Is there a bond?

MR. FOX: I think there is.

MR. HOLZMAN: Yes.

[4] THE COURT: I think they are O.R.s. All members of the community, all living in the city?

MR. FOX: Yes.

THE COURT: O.R. No bond. Costs remitted on all except Hastings.

AND THE FOREGOING WAS ALL OF THE PROCEEDINGS RELATIVE TO THE MOTIONS OF THE DEFENDANTS PRESENTED AT THE HEARINGS OF THE WITHIN CAUSE.

(CERTIFICATE OMITTED)

Supreme Court of the United States

No. 1370 --- , *October Term, 19* 69

Dennis Coates, et al.,

Appellants,

v.

City of Cincinnati

APPEAL from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

May 18, 1970

No. 117 ~~1970~~

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

DENNIS COATES, et al.,
Appellants,

v.

CITY OF CINCINNATI,
Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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March, 1970

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In The

SUPREME COURT OF THE UNITED STATES

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No. ———

DENNIS COATES, et al.,

Appellants,

v.

CITY OF CINCINNATI,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

This is an appeal from a decision of the Supreme Court of Ohio affirming the convictions of Appellants, Dennis Coates, James Hastings, Wendell Saylor, Arnold Adams and Clifford Wyner, in the Hamilton County Municipal Court at Cincinnati, Ohio. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported in 21 Ohio St. 2d 66 and is attached hereto as Appendix A.

JURISDICTION

This litigation originated with the arrests and subsequent convictions of the Appellants for violations of the Loitering Ordinance of the City of Cincinnati. In a four to three opinion, the Supreme Court of Ohio specifically ruled on January 28, 1970 that the State (Municipal) legislation did not violate the First and Fourteenth Amendments to the Constitution of the United States. Notice of Appeal was filed in the Supreme Court of Ohio on February 17, 1970. Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Whitney* v. *California,* 274 U.S. 357, 360-1; *Raley* v. *Ohio,* 360 U.S. 423, 436.

STATUTES INVOLVED

The Code of Ordinances of the City of Cincinnati provide:

> Section 901-L6. Loitering at Street Corners.
>
> It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

QUESTION PRESENTED

Constitutionality of the subject ordinance is the question presented. Overbreadth and vagueness are the features of these cases. The chilling effect of the language of the whim-

sically labeled "Loitering Ordinance" has been condemned by widely scattered Ohio courts. Those courts declared the language violative of First and Fourteenth Amendment concepts or they found from the facts of the cases that convictions could not be justified.

STATEMENT

Applicability of the First and Fourteenth Amendments to the United States Constitution were raised at each stage of the proceedings. In the trial court it was by appellant Coates at the beginning of the case by motion requesting dismissal under the First and Fourteenth Amendments to the United States Constitution, Bill of Exceptions, Coates, page 2 (Appendix B). In the same trial court similar raising of the constitutional question by appellants Hastings, Saylor, Adams and Wyner is shown at page 2 of their Bills of Exceptions (Appendix C). In the intermediate Court of Appeals for the First Appellate District of Ohio the federal questions were asserted by Question No. 1 in the Assignments of Error and Brief (Appendix D hereto). In the Supreme Court of Ohio the federal questions were presented as Question No. 1 in Appellants' brief and were specifically decided in both majority and dissenting opinions.

In the cases at bar the four judges of the Ohio Supreme Court who affirmed the constitutionality of making an annoyance (by men) a crime did not have a record of the facts in the cases. Earlier, the Court had held that making an annoyance (by dogs) a crime was unconstitutional because such a test was vague, *Columbus* v. *Becher,* 173 Ohio St. 197. In that case the Court had asked, "What degree of noise must there be to constitute an annoyance? Are noises included that would be annoying to a few sensitive people but would not disturb others?" (page 199). The Supreme Court of Ohio, in the perhaps different at-

titudes which controlled its philosophies in 1962, concluded its opinion in the *Columbus* v. *Becher* case by lapsing into verse (page 200),

Dogs will howl and cats will yowl
When placed in congregation.
These grating sounds may oft result
In human aggravation.
Laws passed to curb such pesky noise
Should fit the situation
And be so phrased in artful ways
To cause no obfuscation.
In other words, the laws so passed
Must plainly be effective
Inaptly framed, they lack the force
To meet their planned objective.

Not humorous to participants in assemblies concerned with racial problems, the legislative language stands as a symbol of oppression to them without reference to Ohio's protective interpretation for animals (Appendix E). Other Ohio courts have also repudiated criminal enactments using "annoyance" as a test of criminal activity in the case of Halloween celebrants, businessmen and, on the other side, possible Socialist sympathizers. In the cases appealed here, union pickets and a college student dissenter have been added to those who can become convicted criminals because they "annoy".

THE QUESTIONS ARE SUBSTANTIAL

In an apparent backlash at the emergence of First and Fourteenth Amendment rights as meaningful enactments the Ohio Supreme Court has changed the clear trend of Ohio law that had, throughout the state, held the subject type legislation unconstitutional.

Only a year and a half before this case the same judge

who wrote this opinion (*Cincinnati* v. *Coates*), Honorable J. J. P. Corrigan, had written,

"The right of individuals to assemble and associate together is guaranteed by both the United States and Ohio Constitutions, and any legislative attempt to abrogate that right, even though motivated ostensibly by a desire to insure peace and order in the city of Cleveland, cannot stand. Gitlow v. People (1924), 268 U.S. 652; Thornhill v. Alabama (1940), 319 U.S. 88; Cantwell v. Connecticut (1940), 310 U.S. 296; Edwards v. South Carolina (1963), 372 U.S. 229; Deer Park v. Schuster (Hamilton County Common Pleas Court, 1940), 16 O.O. 485, 30 Ohio Law Abs. 466; Toledo v. Sims, 14 O.O. (2d) 66, 84 Ohio Law Abs. 476 (Toledo Municipal Court, 1960).

In addition to the above constitutional weakness, it is apparent that the city of Cleveland's disorderly assembly ordinance also fails to apprise an individual that his conduct is proscribed by law. It is therefore in conflict with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution. United States v. Cohen Grocery Co. (1921), 255 U.S. 81; Connally v. General Construction Co. (1926), 269 U.S. 385; Lanzetta v. New Jersey (1939), 306 U.S. U.S. 451; United States v. Harriss (1954), 347 U.S. 612; Ashton v. Kentucky (1966), 384 U.S. 195; Cleveland v. Baker (Court of Appeals, 1960), 83 Ohio Law Abs. 502. As stated in Connally v. General Construction Co., 269 U.S. 385, at page 391:

'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common in-

telligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. * * *'

* * *

As it is written, the disorderly assembly ordinance could be used to incriminate nearly any group or individual. With little effort, one can imagine many "noisy and boisterous" **ASSEMBLAGES WHICH, AT VARIOUS TIMES, MIGHT ANNOY SOME PERSONS IN THE CITY OF CLEVELAND.** Anyone could become an unwitting participant in a disorderly assembly, and suffer the penalty consequences. It has been left to the police and the courts to decide when and to what extent ordinance Section 13.1124 is applicable. Neither the police or a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules and guidelines to govern its enforcement. This ordinance represents an unconstitutional exercise of the police power of the city of Cleveland, and is therefore void." (Capitalization added.)

This was in *Cleveland* v. *Anderson,* 13 Ohio Appeals 2d 83, 88-90 (1968). That case involved a benefit for a Socialist inclined newspaper. The several million people of the Cleveland area are now subject to persecution for unpopular associations, as *Cincinnati* v. *Coates* interprets the law.

The Hamilton County, Ohio, Common Pleas Court is the general jurisdiction court for the Cincinnati area population (and its decisions are supposed to set precedents for the Hamilton County Municipal Court in which these appellants were convicted) ; in 1940 it held Halloween celebrants were improperly charged by a municipal ordinance using the language under attack here — the legislation was

declared unconstitutional. *Deer Park* v. *Schuster,* 16 Ohio Opinions 485, 30 Ohio Law Abs. 466.

Toledo, Ohio, area businessmen were relieved of the likelihood of prosecution for annoying passers-by when, in 1960, the Municipal Court of that city held the annoyance test was unconstitutional and the learned judge pointed out that the 1774 "loiterers" on Duke of Gloucester Street in Williamsburg, Virginia, including Patrick Henry, Thomas Jefferson, Peyton Randolph and others could not have survived the annoyance to Governor Dunsmore and his constables if they (the constables) had used the "annoying to persons passing by" standard. *Toledo* v. *Sims,* 14 Ohio Opinions (2d) 66, 84 Ohio Law Abs. 476.

More recently, it may be contemplated, Franklin D. Roosevelt, Alfred M. Landon or Martin Luther King might not have been free to assemble with those of their choice in Cleveland, Toledo, Cincinnati or Deer Park if the doctrine of *Cincinnati* v. *Coates* was or is the law in Ohio.

Negroes generally believe the Cincinnati Loitering Ordinance is a thing of substantial interest to them and their aspirations to be accorded equal treatment in the community. The National Advisory Commission on Civil Disorders disclosed the importance of Cincinnati's Loitering Ordinance when it reported on the use of the legislation (Report of the National Advisory Commission on Civil Disorders, April, 1968, The New York Times Edition, E. P. Dutton and Co., Inc., pages 47-50). The case referred to in that report was terminated in an unreported decision which reversed the conviction. *Cincinnati* v. *Lathan Johnson,* Hamilton County Ohio Court of Appeals, case number 10532, August, 1968. The importance of the Loitering Ordinance to the citizens of the Cincinnati area is perhaps fairly reflected by the report of the reversal of the Lathan Johnson case which appeared in

the Cincinnati Post and Times Star, August 18, 1968 (Appendix E).

Columbus, Ohio, area residents will now be in doubt as to both the quantity and quality of annoyance which may safely be created. Dogs may bark (freely?) under the rule of *Columbus* v. *Becher,* 173 Ohio St. 197, but if the people travel to Cincinnati, Cleveland, Toledo or Deer Park and congregate with another two or more persons, they should ascertain in advance just what level of their conduct may prove to be annoying to someone in any of those municipalities.

The questions raised by this appeal are substantial for all the citizens of Ohio. Additionally, other states have similar problems. It was necessary for a three judge federal court to eliminate Louisville, Kentucky's oppressive legislation in an opinion which, in turn, refers to many other situations in which municipalities had not understood the holdings in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, *Terminiello* v. *Chicago,* 337 U.S. 1, and *Ashton* v. *Kentucky,* 384 U.S. 195. The decision is reported in *Baker* v. *Bindner,* 274 Fed. Supp. 658 (1967).

We urge that The Supreme Court of Ohio has upheld legislation which is unconstitutional because of vagueness and overbreadth as described in *Lanzetta* v. *State of New Jersey,* 306 U.S. 451, Harvard Law Review, February, 1970, page 844, and which lends itself to ready use by officials against those deemed to merit their displeasure, *Thornhill* v. *State of Alabama,* 310 U.S. 88, and should be reversed.

Respectfully submitted,

ROBERT R. LAVERCOMBE
1714 First National Bank Building
Cincinnati, Ohio 45202
Counsel for Appellants

APPENDIX A

OPINION OF STATE COURT

CITY OF CINCINNATI, APPELLEE, *v.* COATES, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* HASTINGS, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* SAYLOR, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* ADAMS, APPELLANT.
CITY OF CINCINNATI, APPELLEE, *v.* WYNER, APPELLANT.

[Cite as Cincinnati v. Coates, 21 Ohio St. 2d 66.]

Criminal law—Ordinance prohibiting assemblage on sidewalks annoying persons passing by—Not vague or uncertain—Sufficiency of affidavit charging offense.

A city ordinance making it "unlawful for three or more persons to assemble * * * on * * * sidewalks * * * and there conduct themselves in a manner annoying to persons passing by" is not vague or uncertain but is, on its face, sufficiently clear to inform a person of common intelligence of the nature of the acts prohibited by the ordinance.

(Nos. 69-116, 69-117, 69-118, 69-119 and 69-120—Decided January 28, 1970.)

APPEALS from the Court of Appeals for Hamilton County.

Mr. William A. McClain, city solicitor, *Mr. Ralph E. Cors* and *Mr. A. David Nichols*, for appellee.

Messrs. Beckman, Lavercombe, Fox & Weil and *Mr. Bernard C. Fox*, for appellants.

CORRIGAN, J. We are without the advantage of a bill of exceptions in these appeals from convictions in the Hamilton County Municipal Court for violating Section

901-L6 of the Cincinnati Code of Ordinances. The Court of Appeals for Hamilton County affirmed the convictions, and the causes are before this court pursuant to the allowance of motions to certify the records.

The ordinance in question provides:

"It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both."

With one exception, the separate affidavits upon which the warrants of arrest were based charged that each defendant "being one of a group of more than two persons assembled on the sidewalk on or about April 11, 1968, at and in the city of Cincinnati, Hamilton County and state of Ohio, did unlawfully conduct himself in a manner annoying to persons passing by contrary to and in violation of Section 901-L6 of the Code of Ordinances of the City of Cincinnati."

In case No. 69-116, the affidavit charged defendant "on Dec. 7, 1967, did unlawfully loiter on the sidewalk at 500 Main with 6 other persons and there did conduct himself in a manner annoying to persons passing by * * *."

We are urged to declare this ordinance to be in violation of the First and Fourteenth Amendments to the Constitution of the United States and Section 3, Article I of the Ohio Constitution, for the reasons that it is vague and imprecise as to what conduct is proscribed. A claim is also made that the affidavits do not contain all the material elements to charge an offense under said ordinance.

The First Amendment to the U. S. Constitution provides, in part:

"Congress shall make no law * * * abridging * * * the right of the people to peaceably assemble * * *."

This right of assembly, granted by both state and federal constitutions, contemplates that it be asserted and enjoyed in a peaceable manner. The right delineated certainly does not include the contravening of other rights of other persons. The affidavits under scrutiny here charge assembly and a course of conduct "* * * annoying to persons passing by * * *." Without a bill of exceptions we do not know what the conduct was which was considered annoying.

Could it have been the interrupting or interfering with the free, unimpeded passage, the use of and enjoyment of the public sidewalk or street by other persons?

Could it have been an intrusion upon the privacy of persons using the public sidewalk or street by accosting and seeking to deliver to such persons written or printed messages, papers, pamphlets, cards or books?

Could it have been an intrusion upon the privacy of persons to impart an oral message by blocking or otherwise seeking to detain persons in the free use of the public sidewalks or streets?

On the state of the record before us, we will go to our rewards without knowing.

As to the contention that this ordinance is imprecise, vague and indefinite, we do not agree. Certainly, crime must be defined with certainty and definiteness, which requirements are elements of due process. Persons charged with violations of penal statutes or ordinances are not required to speculate as to the meaning of such legislation. If the provisions of an ordinance are so vague that persons of common intelligence must guess as to their

meaning, then an essential of due process is lacking. *Connally* v. *General Construction Co.*, 269 U. S. 385.

The ordinance prohibits, *inter alia*, "conduct * * * annoying to persons passing by." The word "annoying" is a widely used and well understood word; it is not necessary to guess its meaning. "Annoying" is the present participle of the transitive verb "annoy" which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.

We conclude, as did the Supreme Court of the United States in *Cameron* v. *Johnson*, 390 U. S. 611, 616, in which the issue of the vagueness of a statute was presented, that the ordinance "clearly and precisely delineates its reach in words of common understanding. It is a 'precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be * * * proscribed."

Although we conclude that the meaning of the words used in the ordinance is clear and that the standard of conduct which it specifies is not dependent upon each complainant's sensitivity, we are unable to apply it to the facts in this case because of the absence of facts in the record before us.

We find no merit in defendants' claim that the affidavits herein do not contain all the material elements to charge an offense under this ordinance.

The judgments of the Court of Appeals are affirmed.

Judgments affirmed.

TAFT, C. J., MATTHIAS and SCHNEIDER, JJ., concur.
O'NEILL, HERBERT and DUNCAN, JJ., dissent.

HERBERT, J., dissenting. There being no bill of exceptions in these cases, the sole and proper question raised by these appeals is the constitutionality, on its face, of

Section 901-L6 of the Cincinnati Code of Ordinances. It appears to be well established that the question of the constitutionality of a statute or ordinance is judicially cognizable under these circumstances. *Belden* v. *Union Central Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N. E. 2d 629; *Blacker* v. *Wiethe* (1968), 16 Ohio St. 2d 65, 242 N. E. 2d 655. *Cf. Castle* v. *Mason* (1915), 91 Ohio St. 296, 110 N. E. 463; *State, ex rel. Herbert,* v. *Ferguson* (1944), 142 Ohio St. 496, 52 N. E. 2d 980; *State, ex rel. Speeth,* v. *Carney* (1955), 163 Ohio St. 159, 126 N. E. 2d 449.

Defendants were convicted of violating Section 901-L6 of the Cincinnati Code of Ordinances, which provides:

"It shall be unlawful for three or more persons to assemble, *except at a public meeting of citizens,* on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both." (Emphasis added.)

Since the syllabus announced by the majority does not contain all of the pertinent language of the ordinance under consideration, I am respectfully constrained to characterize it as dicta. Therefore, this dissent should not be construed as necessarily encompassing that syllabus.

The defendants claim that the ordinance violates the Constitution of the United States in that it is vague, indefinite and imprecise as to what conduct is prohibited.

The United States Supreme Court, in the case of *United States* v. *Petrillo* (1947), 332 U. S. 1, 91 L. Ed. 1877, stated that while the Constitution of the United States does not require impossible standards of certainty in statutes defining crimes, the test is whether or not the law is so

designed that persons of ordinary intelligence, who would be law abiding, can determine with reasonable precision what conduct it is their duty to avoid. *Connally* v. *General Construction Co.* (1926), 269 U. S. 385, 70 L. Ed. 322; *Cramp* v. *Board of Public Instruction* (1961), 368 U. S. 278, 7 L. Ed. 2d 285; *Winters* v. *New York* (1948), 333 U. S. 507, 92 L. Ed. 840. The rule is also well settled that penal laws must be strictly construed and are to be interpreted strictly against the state and liberally in favor of the accused. See *Mentor* v. *Giordano* (1967), 9 Ohio St. 2d 140, 224 N. E. 2d 343; *State* v. *Conley* (1947), 147 Ohio St. 351, 71 N. E. 2d 275; *State* v. *Meyers* (1897), 56 Ohio St. 340, 47 N. E. 138; *Turner* v. *State* (1853), 1 Ohio St. 422; *Hirn* v. *State* (1852), 1 Ohio St. 15.

Reading the instant ordinance in accordance with those rules of construction, and even assuming that what will constitute "annoying" conduct is sufficiently definite so as to be reasonably understood by all men who would be law abiding citizens, it is apparent that conduct which, in fact, is "annoying," is not unlawful if it is conduct at a "public meeting of citizens." Thus, the threshold question before us should be whether the ordinance is sufficiently definite and precise to inform a group of three or more citizens that their particular gathering is or is not such a "meeting" and, hence, is or is not excepted from the operation of the ordinance.

There appears to be little doubt that the language, "except at a public meeting of citizens," was written into the ordinance to offset potential claims that the ordinance affronted the constitutional right of peaceful assembly. The United States Supreme Court has spoken often in this area and has declared that stricter standards of permissible statutory vagueness should be applied to

any statute or ordinance which has a potentially inhibiting effect upon rights guaranteed by the First Amendment to the Constitution of the United States. *Smith* v. *California* (1959), 361 U. S. 147, 4 L. Ed. 2d 205; *Cramp* v. *Board of Public Instruction, supra* (368 U. S. 278); *Winters* v. *New York, supra* (333 U. S. 507); *Thornhill* v. *Alabama* (1940), 310 U. S. 88, 84 L. Ed. 1093; *Scull* v. *Virginia, ex rel. Committee on Law Reform and Racial Activities* (1959), 359 U. S. 344, 3 L. Ed. 2d 865; *Stromberg* v. *California* (1931), 283 U. S. 359, 75 L. Ed. 1117; *Wright* v. *Georgia* (1963), 373 U. S. 284, 10 L. Ed. 2d 349. In those cases, the United States Supreme Court was concerned with "the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications of the statute." *Wright* v. *Georgia, supra,* 292.

Even if it is assumed that conduct which is reasonably calculated to be "annoying" is well known to reasonable men who would be law abiding citizens, the ordinance nevertheless fails to define the boundary between that assemblage which will constitute a "public meeting of citizens" and that which will not be considered such a meeting. For example, do only groups which have licenses constitute a public meeting? Must some form of notice be given before a meeting may be considered a public meeting? Who may convene a public meeting? Is a public meeting one held only in a public place? Must a meeting be held during certain hours in order to be "public"? May a public meeting be called only for certain purposes? Is it clear that an assemblage of three or more citizens on a public sidewalk can not constitute a public

meeting of those citizens? In short, although the ordinance clearly excepts "annoying" behavior "at a public meeting of citizens" there is no indication as to what conduct was included in the very words which announce that exception.

In my opinion, where an ordinance inflicts a criminal penalty for certain conduct, but excepts such conduct from its operation under certain circumstances, both the proscribed conduct and the excepting circumstances must be designated with sufficient precision to meet constitutional requirements regarding vagueness and uncertainty. The failure of the ordinance under consideration to meet this test renders it unconstitutional on its face.

DUNCAN, J., concurs in the foregoing dissenting opinion.

APPENDIX B

BILL OF EXCEPTIONS – COATES

HAMILTON COUNTY MUNICIPAL COURT
STATE OF OHIO

No. 1052

CITY OF CINCINNATI,

Plaintiff,

vs.

DENNIS COATES,

Defendant.

BILL OF EXCEPTIONS

BE IT REMEMBERED that upon the trial of this cause commencing on March 27, 1968 before the Honorable Rupert A. Doan and continuing on March 29, 1968 before the Honorable Joseph A. Luebbers, Judges of the Hamilton County Municipal Court, the following proceedings were had:

APPEARANCES:

On behalf of Plaintiff:
Norbert A. Nadel, Esq.
Assistant City Prosecutor
(Hearing March 27, 1968)

A. David Nichols, Esq.
Assistant City Prosecutor
(Hearing March 29, 1968)

On behalf of Defendant:
Bernard C. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

[2] MARCH 27, 1968
10:30 A.M.

MR. NADEL: This is City of Cincinnati vs. Dennis Coates and all witnesses, Your Honor.

THE COURT: As I understand, you are not ready to proceed to trial?

MR. NADEL: That's right.

THE COURT: But Mr. Fox has matters to present to the Court?

MR. NADEL: That is correct, Your Honor.

THE COURT: That we will consider now. All right.

MR. FOX: First off, I'd like to make an oral motion to dismiss on the basis that the ordinance in question violates the First Amendment of the United States Constitution, and Section 3, Article I of the Ohio Constitution, Due Process, and the Fourteenth Amendment of the United States Constitution. I'll just briefly give you a couple of cases that I have.

(Argument by Mr. Fox and Mr. Nadel, and the Court then took the motion to dismiss under submission pending handing down of a ruling in a similar case now pending before an appeal court.)

MR. FOX: I'd like to file a motion to quash [3] also which raises a different point, and maybe I'm the eternal optimist; maybe the Court will rule in my favor on this. We are moving to quash on the basis that the affidavit doesn't charge any violation of any ordinance of the City of Cincinnati, whether it's constitutional or otherwise (handing document to the Court.)

(Counsel for defendant discussed the motion to quash with the Court, following which the Court overruled the motion.)

MR. FOX: If I can bother you once more, I'll file a demurrer because I'm never sure which you should file, a motion to quash or a demurrer (handing document to Court.)

(Counsel for defendant discussed the demurrer with the Court, following which the Court overruled the demurrer.)

THE COURT: Then, as I understand it, Friday we will proceed with the testimony, proceed with the trial, and we will withhold the matter of your motion and withhold the matter of the decision, if it should get to that point, the decision on the merits of the case.

(Thereupon the trial was adjourned until Friday, March 29, 1968, at 9:00 A.M.)

[4] And thereafter, on FRIDAY, MARCH 29, 1968, before the HONORABLE JOSEPH A. LUEBBERS, one of the Judges of the Cincinnati Municipal Court, the above-captioned matter came on for trial on the affidavit of Officer Thomas J. Martin, charging violation of Section 901-L6 of the Ordinances of the City of Cincinnati.

APPEARANCES:

On behalf of Plaintiff:
A. David Nichols, Esq.
Assistant City Prosecutor

On behalf of Defendant:
Bernard J. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

THE COURT: Do I understand this is a short case, Mr. Fox?

MR. FOX: That's what I am told.

THE COURT: We usually take those at the end of the docket, so will do that this morning, to be sure, because we have some other matters.

MR. FOX: No dispute over the facts, as far as I know.

THE COURT: How many witnesses?

[5] MR. FOX: I have only one defendant; I doubt I will call him, unless something surprises me.

MR. NICHOLS: We have four witnesses.

MR. FOX: I assume they will be substantially the same.

THE COURT: Let's proceed.

MR. NICHOLS: What is the plea?

MR. FOX: I am going to renew my motion, I think I will renew them, just briefly.

THE COURT: What is the charge here?

MR. NICHOLS: Charge under 901-L6, loitering section of the City Ordinances.

MR. FOX: Before proceeding with the testimony, I want to renew first my motion to dismiss, on the grounds that the ordinance itself is unconstitutional, violates the Fourteenth Amendment and the First Amendment to the United States Constitution and the Ohio Consitution, Section 2 of Article III.

I am not going to argue the question before the Court, in view of the Lathan Johnson case I would suggest this motion be taken under submission until that's decided; they are going to argue that within a matter of a couple of weeks.

MR. NICHOLS: In fact, the specific motions on this

specific case, as set out by Mr. Fox, I understand have [6] already been before Judge Doan of the Municipal Court; is that right?

MR. FOX: That's right.

MR. NICHOLS: Therefore I think the motions should be in abeyance at this time inasmuch as he already has the jurisdiction.

THE COURT: The motion in this case?

MR. NICHOLS: Yes.

MR. FOX: He has not decided it, so I want to renew it.

THE COURT: He has not ruled on the motion?

MR. FOX: He said he would hold it in abeyance until the Court of Appeals decides. I suggest we do the same.

THE COURT: We will do the same.

MR. FOX: I also filed a motion to quash on the basis the affidavit does not state a crime. The particular statute involved prescribes assembling with three or more persons, and the affidavit says that Coates did unlawfully loiter on the sidewalk. Now, loitering and assembling are not synonomous.

(Argument by Mr. Fox)

THE COURT: What do you have to say, Mr. Nichols?

[7] MR. NICHOLS: Your Honor, with regard to the motion to quash, I believe that was also before Judge Doan in this same manner. At that time I believe it was overruled, Your Honor.

MR. FOX: I think that's right.

THE COURT: Let's see the affidavit. (The Court examined the affidavit.)

MR. NICHOLS: I would say, Your Honor, inasmuch as the motion has been before one member of the Mu-

nicipal Bench, that he has already ruled, that brings to conclusion the question, and it is a final order. Under the circumstances, the question in this case from which Mr. Fox on behalf of the defendant may appeal therefore is moot, as appears now, other than for his purposes for the record.

MR. FOX: I just want to be sure it is in.

THE COURT: I presume it is made for the purpose of the record. Based on that, I don't think I have to rule on it at all, it's been ruled on.

MR. FOX: I want to be sure.

THE COURT: All right. Well, so then it's already been overruled.

MR. NICHOLS: If I may, Your Honor, is this not a correct statement, Mr. Fox — that the motions have already been ruled on?

[8] MR. FOX: Yes, there is no question about that. I never know what is going to happen in the Court of Appeals, and we will raise it here, they may say I should have.

THE COURT: For the purpose of the record, let the record show in the previous hearing this motion was overruled.

MR. FOX: That's all the motions I have.

THE COURT: All right.

MR. FOX: Is it my understanding, Your Honor, you are following this determination by Judge Doan and in all previous matters in regard to the motion?

THE COURT: That's right, exactly right.

MR. NICHOLS: What is the plea?

MR. FOX: Not guilty.

THE COURT: Not guilty. Raise your right hands to be sworn.

(All witnesses sworn.)

THE COURT: Is there a jury waiver?

MR. FOX: Yes, I have one (handing jury waiver to the Court.)

THE COURT: All right, Mr. Coates, you want the jury waived, and you want the case to be heard here by the Court, is that correct?

THE DEFENDANT: Yes.

(Testimony offered on behalf of plaintiff.)

[9] THE COURT: You have evidence?

(Argument by Mr. Fox and by Mr. Nichols.)

THE COURT: The finding of the Court is guilty. Ever been arrested before?

THE DEFENDANT: No.

THE COURT: What do you do?

THE DEFENDANT: I am a student.

(Further questioning by the Court.)

THE COURT: Anything further, Counselor?

MR. FOX: How is the Court going to proceed? Are you going to overrule the motion to dismiss or are you going to hold the whole thing in abeyance and come back for sentence? It might be just as well to overrule it even though it is submitted to Judge Doan, to overrule our new motion to dismiss, get the sentencing and everything out of the way. We are going to appeal.

THE COURT: I think that might be the —

MR. FOX: Rather than come back and forth.

THE COURT: As long as you are going to, I think that's the better way, too, otherwise it is just going to delay it and muddy up the waters.

MR. FOX: Let me say something further about Mr. Coates. (Statement of Mr. Fox)

THE COURT: The Court feels that there is no [10] objection to demonstration as long as it confines itself within the scope of the law, and this did not.

MR. FOX: Well, I agree it might violate some of these, but not the one –

THE COURT: It is the sentence of the Court $50.00 and costs, one year's probationary, informal probationary period. Any kind of difficulty within the year would be violation of your probation, it means you come back here and be subject to thirty days in the workhouse.

MR. FOX: May we have a stay at this time?

THE COURT: How long do you need? Thirty days?

MR FOX: I guess that gives me enough time.

THE COURT: The 29th – same bond.

AND THE FOREGOING WAS ALL OF THE PROCEEDINGS RELATIVE TO THE MOTIONS OF THE DEFENDANT PRESENTED AT THE HEARINGS OF THE WITHIN CAUSE.

[11] CERTIFICATE

And the foregoing were all of the proceedings on the motions and demurrer of the defendant in the above-captioned case.

And the Court having overruled said motions and demurrer, as appears of record herein,

Now comes the defendant, by his counsel, and within the time provided by law, files this, his Bill of Exceptions, the same having been filed with the Clerk of this Court within the time provided by law for the filing of same, and asks that the same may be certified by the Court as containing all of the proceedings relative to defendant's motions to dismiss and demurrer, and asks that the same may be allowed, settled, signed and made a part of the record herein, all of which is accordingly done.

WITNESS the hand of this Court this ..... day of ....., 1968.

.....
Rupert A. Doan, Judge
Hamilton County Municipal Court

.....
Joseph A. Luebbers, Judge
Hamilton County Municipal Court

APPENDIX C

BILL OF EXCEPTIONS – HASTINGS

STATE OF OHIO
HAMILTON COUNTY MUNICIPAL COURT

No. 7857
No. 7858
No. 7859
No. 7860

CITY OF CINCINNATI,
Plaintiff,

vs.

JAMES HASTINGS,
WENDELL SAYLOR,
ARNOLD ADAMS
CLIFFORD WYNER,
Defendants.

BILL OF EXCEPTIONS

BE IT REMEMBERED that on Tuesday, April 23, 1968, at 9:45 A.M., before the Honorable Joseph A. Luebbers, one of the Judges of the Hamilton County Municipal Court, the above-captioned cases came on for trial.

APPEARANCES:

On behalf of Plaintiff:
Wallace Holzman, Esq.
Assistant City Prosecutor

On behalf of Defendants:
Bernard C. Fox, Esq.
of
Beckman, Lavercombe, Fox & Weil

[2] MR. HOLZMAN: There is a jury waiver and withdrawal of demand for jury, and all of the defendants have been advised of their constitutional rights, but they have decided to waive their rights to trial by jury and have the Court hear the facts and determine the issues of law. Mr. Fox, what is the plea?

MR. FOX: I will make a motion first, to dismiss. I want to raise the constitutionality of the ordinance. I have argued it to the Court before, Your Honor; it is on appeal and will be argued in the Court of Appeals in June, and I don't think it is necessary for me to cite the usual authorities and all that.

THE COURT: No; they may be added in the record, if you would like. The motion will be overruled.

MR. FOX: The plea is not guilty.

MR. HOLZMAN: The plea is not guilty. Will all witnesses please come forward and be sworn.

(Thereupon the plaintiff presented its evidence.)

MR. HOLZMAN: We rest, Your Honor.

MR. FOX: I move to dismiss.

(Argument by Mr. Fox in support of motion and by Mr. Holzman in opposition to motion.)

THE COURT: The motion will be overruled.

(Thereupon the defendants presented their evidence.)

[3] MR. HOLZMAN: I will waive opening or closing argument.

(Further argument by Mr. Fox and Mr. Holzman.)

THE COURT: It is true in picketing probably that could be annoying to some people along the way, and in all probability it is, but that in itself does not bring it within the scope of any of the ordinances, because it happens to annoy someone. However, when you are blocking either an occupant of the building or someone trying to get in, that's a different situation, and if they ask you to move and say "Don't block the truck," then, of course, you should move and continue your picketing after the truck has either entered or departed.

The finding of the Court is guilty. Costs on each.

MR. FOX: May we have a stay?

THE COURT: Sure.

MR. FOX: Thirty days?

THE COURT: All right.

MR. FOX: I think there is a bond here.

THE COURT: 5/23, same bond, if there is one. Is there a bond?

MR. FOX: I think there is.

MR. HOLZMAN: Yes.

[4] THE COURT: I think they are O.R.s. All members of the community, all living in the city?

MR. FOX: Yes.

THE COURT: O.R. No bond. Costs remitted on all except Hastings.

AND THE FOREGOING WAS ALL OF THE PROCEEDINGS RELATIVE TO THE MOTIONS OF THE DEFENDANTS PRESENTED AT THE HEARINGS OF THE WITHIN CAUSE.

[5] CERTIFICATE

And the foregoing was all of the proceedings on motions of defendants to dismiss, in the above-captioned cases.

And the Court having overruled said motions, as herein set forth,

Now come the defendants, by their counsel, and within the time provided by law, file this, their Bill of Exceptions, the same having been filed with the Clerk of this Court within the time provided by law for the filing of same, and ask that the same may be certified by the Court as containing all of the proceedings relative to defendants' motions to dismiss, and ask that the same may be allowed, settled, signed and made a part of the record herein, all of which is accordingly done.

WITNESS the hand of this Court this ..... day of October, 1968.

.....
Judge
Hamilton County Municipal Court
State of Ohio

APPENDIX D

APPELLANTS' ASSIGNMENTS OF ERROR, STATE APPELLATE COURT

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO

CITY OF CINCINNATI
Plaintiff-Appellee

vs.

DENNIS COATES — No. 10703
Defendant-Appellant

JAMES HASTINGS — No. 10707
Defendant-Appellant

WENDELL SAYLOR — No. 10706
Defendant-Appellant

ARNOLD ADAMS — No. 10704
Defendant-Appellant

CLIFFORD WYNER — No. 10705
Defendant-Appellant

APPELLANT'S ASSIGNMENT OF ERROR AND BRIEF

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Appellants

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Attorney for Plaintiff-Appellee

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AUTHORITIES CITED

[1] STATEMENT OF THE CASE

All of these cases were tried in the Cincinnati Municipal Court. All of them involve the "Loitering" ordinance of the City of Cincinnati. The defendants in all of these cases filed motions to quash and demurrers attacking the sufficiency of the affidavits. All of these motions and demurrers were overruled. All of the defendants made oral motions to dismiss on the constitutionality of said "Loitering" ordinance. These motions were overruled. There-

after, the City presented testimony on its behalf. The defendants offered no evidence and rested at the completion of the City's case. The defendant in each of these cases was found guilty and sentence was pronounced. Thereafter, each of the defendants filed a motion for new trial which was overruled and thereupon filed their notices of appeal to this Court.

[2] QUESTIONS PRESENTED

QUESTION NO. 1

In all of these cases there is raised the question of whether or not the "Loitering" ordinance of the City of Cincinnati violates the First Amendment and the Fourteenth Amendment of the Constitution of the United States and Section 3, Article I of the Ohio Constitution.

QUESTION NO. 2

In the cases of DENNIS COATES and JAMES HASTINGS, the question of the sufficiency of the affidavit to charge a crime is raised. The question of the sufficiency of the affidavits in the cases of WENDELL SAYLOR, ARNOLD ADAMS and CLIFFORD WYNER is hereby waived.

[3] FIRST ASSIGNMENT OF ERROR

The Court erred in each of these cases and in overruling the defendants motions to dismiss each of the defendants on the basis that the "Loitering" ordinance of the City of Cincinnati was unconstitutionally under the United States Constitution and the Constitution of the State of Ohio.

SECOND ASSIGNMENT OF ERROR

In the cases of DENNIS COATES and JAMES HASTINGS, the Court erred in overruling the motions to quash of the defendants and the demurrers of the defendants.

[4] ARGUMENT

FIRST QUESTION:

The defendants were convicted violating an ordinance of the City of Cincinnati, Section 901-L 6. The ordinance is entitled "Loitering at Street Corners". The text of the ordinance is as follows:

> 'It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.'

The conduct prohibited by this ordinance is so vague and imprecise that a person is unable to determine what conduct, in which he may be engaged, will later be construed to be "annoying to persons passing by, or occupants of adjacent buildings." Various standards and levels of annoyance may, and certainly do, prevail from person to person and from group to group. Accordingly, no standard is established by which a person may know what conduct is annoying to passers-by or occupants of adjacent buildings. The determination can only be made when the passer-by or occupier of adjacent buildings claims to be annoyed and causes an arrest.

[5] There have been numerous cases striking down ordinances of the nature of the Cincinnati "Loitering" ordinance. These ordinances are far more precise than the one in question. A Toledo, Ohio, ordinance virtually identical with the ordinance in question was declared unconstitutional in the case of *City of Toledo* v. *Sims* 14 O.O. (2d) 66. One of the reasons for the unconstitutionality of the ordinance was the failure to lay down any rules or standards.

Guyot v. *Pierce* 372 F 2d 658 (5CCA) decided February 1967, found that the Municipal Ordinance in which the test was "distracting activity" was unconstitutional in that it did not define what constituted "distracting activity". Nowhere in the ordinance in question is there a definition of "annoying".

In *Carmichael* v. *Allen* 267 F. Supp. 985, decided in March of 1967, the District Court at Atlanta, Georgia ruled that an ordinance making it unlawful for a person to act in a violent, turbulent, quarrelsome, boisterous, indecent or disorderly manner or to use profane, vulgar or obscene language, or to do anything tending to disturb the good order, morals, peace or dignity of the city, was unconstitutional as restricting speech or the right of peaceful assembly.

The case of *Baker, et al.* v. *Binder, et al.* 274 F. Supp. 658, was decided in October of 1967. The Court in this case struck [6] down certain statutes of Kentucky and ordinances in the City of Louisville on constitutional grounds. As an example, the Kentucky statute found unconstitutional, read as follows: (P. 661):

> "No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a pub-

> lic offense from lawful custody with a view of inflicting punishment on him or of preventing his prosecution or of doing any felonious act."

In finding the statute unconstitutional, the Court said,

> "This statute makes *it a crime for two or more persons to go forth together for the purpose of disturbing another person.* It is not limited in its applicability to violent conduct on the part of the offender. It appears written as embracive of terms of expression and *is susceptible of being read to include such functions as peaceable assembly.*" (Emphasis added)

The Court recognized that a criminal penalty for "disturbing" someone would leave open the standard of responsibility and involve "calculations" as to the boiling point of a particular person. The Court also struck down the Kentucky "vagrancy" statute saying,

> "It does not give fair notice, it is arbitrary as to its standards and is grossly susceptible of overreaching federal constitutional guarantees by lending itself for ready use by officials against those deemed to merit their displeasure."

[7] In finding the City of Louisville disorderly conduct ordinance unconstitutional, the Court said (p. 663),

> "It leaves to the Executive and Judicial branches too wide a discretion in the application of the law and too readily permits them to make a crime out of what is protected activity."

Recently, the Court of Appeals of Cuyahoga County in the case of *Cleveland* v. *Anderson* 13 O.A. 2d 83, found that a Municipal ordinance which forbids any one from making himself a part of any noisy, boisterous or disorderly disassembly of persons countenancing the same by his

presence, which annoys the inhabitant of the city or any participant thereof, constitutes an unreasonable infringement the right of free assembly as guaranteed by the First Amendment of the United States Constitution in Section 3, Article I of the Ohio Constitution. The Court further found that the due process clause of the Fourteenth Amendment to the United States Constitution is violated when a Municipal ordinance prohibiting participation in a disorderly assembly is written in terms so vague that neither the police nor a citizen can ascertain what exact conduct is proscribed.

The Court, at page 90, said,

> "With little effort, one can imagine many 'noisy or boisterous' assemblages which, at various times, might annoy some persons in the city of Cleveland. Anyone could become an unwitting participant in a disorderly assembly and suffer the penalty consequences. * * * Neither the police [8] nor a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules and guidelines to govern its enforcement. This ordinance represents an unconstitutional exercise of the police power of the city of Cleveland and is therefore void."

All of the shortcomings that the Cuyahoga County Court of Appeals found in the Cleveland ordinance are found in the Cincinnati ordinance and more so.

SECOND QUESTION :

The affidavit in the case of DENNIS COATES, is as follows:

> "Thomas J. Martin, being first duly cautioned and sworn, deposeth and said that one DENNIS COATES, on or about the 7th day of December, 1967, at and

> in the City of Cincinnati, County of Hamilton, and State of Ohio, did Unlawfully *Loiter* on the sidewalk at 500 Main with 6 other persons and there did conduct himself in a manner annoying to persons passing by, Contrary to and in violation of Section 901 – L 6 of the code of Ordinances of the City of Cincinnati." (Emphasis added)

[9] The body of the ordinance of the City of Cincinnati reads as follows:

> "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

DENNIS COATES is not charged with assembly as required by the ordinance but rather he is charged with unlawful loitering. "Loitering" is defined as follows:

> 'Consume time idly; to linger along the way; spend time idly; be dilatory; delay'.

"Assemble" is defined as follows:

> 'To bring together; gather into a place; to come together'.

Nothing in the definition of "loiter" includes the word "assemble" or vice versa. A material element of the offense as defined by the ordinance of Cincinnati is omitted from the affidavit and such omission is fatal to its validity. *State* v. *Cimpritz,* 158 Ohio St. 490. That case dealt with a fatal defect in an indictment. The same principals are applicable to an affidavit in a misdemeanor. *State*

v. *Latham* 120 Ohio App. 176. The indictment in this [10] case does not charge DENNIS COATES with assembling and therefore omits a material element of an offense

With respect to the affidavit charging JAMES HASTINGS with a crime, it reads as follows:

> "Pat'n Hochstrasser, being first duly cautioned and sworn, deposes and says that James Hastings being one of a group of more than two persons assembled on the sidewalk on or about April 11, 1968, at and in the City of Cincinnati, Hamilton County and State of Ohio, did unlawfully conduct himself in a manner annoying to persons passing by contrary to and in violation of Section 901 — L 6 of the Code of Ordinances of the City of Cincinnati".

The ordinance prohibits three or more persons to assemble and conduct *themselves* in an annoying manner. It fails to charge that the group was conducting *themselves* in an annoying manner, but limits it to JAMES HASTINGS conduct by charging "himself" with annoying conduct.

[11] CONCLUSION

This Court should declare the ordinance in question unconstitutional and reverse the convictions of the defendants in all these cases. Furthermore, it is obvious that the affidavits as to JAMES HASTINGS and DENNIS COATES are defective since they omit necessary elements of the crime, and should be dismissed for this reason.

Respectfully submitted,

/s/ BERNARD C. FOX
Bernard C. Fox
1714 First National Bank Building
Cincinnati, Ohio 45202

APPENDIX E

NEWSPAPER ARTICLE, CINCINNATI POST & TIMES STAR

August 19, 1968

Conviction of Lathan Johnson, who was charged with loitering while urging Avondale residents to get off the streets during the June 13, 1967, riot, was reversed today.

Three out-of-town judges sitting as the Ohio Court of Appeals reversed the conviction on "a failure of proof" of violation of the loitering ordinance.

JUDGE ARTHUR W. Doyle of Akron, who wrote the opinion, said that, "while we have grave doubts of the constitutionality of this ordinance, we prefer not to pass upon the question in this case."

Johnson attorney, Robert R. Lavercombe, based the appeal mainly on the alleged unconstitutionality of the ordinance. The appeal had been considered locally as a test case of the ordinance.

The court held that, "The evidence does not establish the fact that he, as a part of the lawless group, annoyed anyone, except perhaps the officer who made the arrest after the crowd was dispersed.

"IT MAY BE fary [sic] said that the unruly mob of persons did conduct themselves in such a manner as to violate the language of the ordinance. However, to find this appellant (Johnson) a part of the mob would require this court to say he was guilty by association only. This doctrine has no place in this case."

At the time of his arrest, Johnson was assistant director of the Greater Cincinnati Federation of Settlements and Neighborhood Centers. He has been living for the past

year in Boston where he is studying for a doctorate degree at Brandeis University.

JOHNSON was convicted after pleading innocent, by Judge William S. Mathews in Police Court Sept. 7, 1967. He was sentenced to 30 days in the Workhouse and fined $50 and costs.

Johnson was arrested shortly after midnight, during the 1967 riot, near Rockdale and Burnet avenues by Patrolman Melvin Thurman. Thurman testified that he and other police had ordered the crowd there to disperse and that all but Johnson obeyed.

APPENDIX F

FINAL ORDER, OHIO SUPREME COURT

This Appendix is pursuant to Rule 15 (1)(i).

THE SUPREME COURT OF THE STATE OF OHIO

1970 TERM

To wit: January 28, 1970

Nos. 69-116, 69-117, 69-118, 69-119 and 69-120

THE STATE OF OHIO,
City of Columbus.

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

DENNIS COATES,
JAMES HASTINGS,
WENDELL SAYLOR,
ARNOLD ADAMS, and
CLIFFORD WYNER,
Defendants-Appellants.

APPEALS FROM THE COURT OF APPEALS

for HAMILTON *County*

These causes, here on appeals from the Court of Appeals for Hamilton County, were heard in the manner

prescribed by law. On consideration thereof, the judgments of the Court of Appeals are affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the CINCINNATI MUNICIPAL COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 28 day of January 1970.

/s/ .....Clerk

/s/ .....Deputy

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CITATIONS

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1370

DENNIS COATES, et al.,

Appellants,

v.

CITY OF CINCINNATI,

Appellee.

On Appeal from the Supreme Court of Ohio

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Ohio on the ground that it is manifest that the question is so unsubstantial as not to need further argument.

I

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTE

This appeal raises the question of the constitutional validity of Section 901-L6 of the Cincinnati Code of Ordinances.

This ordinance provides that it shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings.

The Code of Ordinances of the City of Cincinnati provides:

> Section 901-L6. Loitering at Street Corners.
>
> It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

B. THE PROCEEDINGS BELOW

The appellants were charged, tried and convicted in the Hamilton County Municipal Court of violating the Cincinnati ordinance. The appellants offered no defense other than challenging the ordinance as being in violation of their constitutional rights under Article I, Section 3, of the Constitution of the State of Ohio and the First and Fourteenth Amendments to the Constitution of the United States.

The appellants timely filed their appeal with the Court of Appeals for the First Appellate District of Ohio which affirmed the trial court. Thereafter appellants took their appeal to the Supreme Court of Ohio which also af-

firmed the trial court's decision that the ordinance in question is not vague or uncertain but is, on its face, sufficiently clear to inform a person of common intelligence of the nature of the acts prohibited by the ordinance. *Cincinnati* v. *Coates*, 21 Ohio St. 2d 66 (1970).

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

There is no bill of exceptions in these cases, therefore the only question before the Court is the validity of the ordinance under attack.

The ordinance is attacked as being invalid on two grounds: (1) that the phrase "conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings" is too vague and indefinite to meet the requirements of due process in that men of common intelligence must necessarily guess at its meaning and differ as to its application and (2) that the phrase is too broad, that it acts as an unnecessary restraint on First Amendment freedoms.

The terms of the challenged ordinance are sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926). The ordinance involved clearly and precisely delineates its reach in words of common understanding when it prohibits, *inter alia*, "conduct . . . annoying to persons

passing by". There is no mystery or confusion regarding the word "annoying". The Ohio Supreme Court defines the word "annoying" to be the present participle of the transitive verb "annoy" which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate. *Cincinnati* v. *Coates,* 12 Ohio St. 2d 66 (1970). The Constitution does not require impossible standards of certainty in statutes or ordinances defining crimes, all that is necessary is that the language convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. *Cameron* v. *Johnson,* 390 U.S. 611 (1968); *United States* v. *Petrillo,* 332 U.S. 1 (1946).

The language of the ordinance speaks solely to conduct. This Court said in *Cox* v. *Louisiana,* 379 U.S. 536, 555 (1965):

> "We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct . . . as these Amendments afford to those who communicate ideas by pure speech."

The fact that an ordinance punishes an unlawful assembly of those who meet together and "conduct themselves in a manner annoying to persons passing by" does not render it objectionable. The Supreme Court has not said that ordinances of this type are void per se, but void when they purport to reach or are applied to peaceful conduct. *Devine* v. *Wood,* 286 F. Supp. 102 (1968); *Wright* v. *City of Montgomery, Alabama,* 406 F. 2d 867 (1969). The ordinance challenged by appellants is not vague nor is the question presented new, unique or substantial. Therefore, we urge this Court to dismiss the

appeal herein, or in the alternative, to affirm the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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A. DAVID NICHOLS
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Counsel for Appellee

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TABLE OF CASES

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1370

DENNIS COATES, et al.,

Appellants,

v.

CITY OF CINCINNATI,

Appellee.

Appeal from the Supreme Court of Ohio

APPELLANTS' BRIEF

This is an appeal from a decision of the Supreme Court of Ohio affirming the convictions of Appellants Dennis Coates, James Hastings, Wendell Saylor, Arnold Adams and Clifford Wyner in the Hamilton County Municipal Court at Cincinnati, Ohio. They were convicted of violating the Cincinnati Loitering Ordinance which provides for conviction of defendants who conduct themselves in a manner annoying to persons passing by.

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported in 21 Ohio St. 2d 66 (Appendix, p. 7).

JURISDICTION

The majority opinion and the dissenting opinion of the Supreme Court of Ohio specifically considered the federal constitutional question; the case holds that the municipal ordinance involved does not violate the First and Fourteenth Amendments to the Constitution of the United States. Jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257(2). The opinion and final order of the Supreme Court of Ohio are dated January 28, 1970; Notice of Appeal was filed in that Court on February 17, 1970. The Jurisdictional Statement herein was filed on March 30, 1970 and the Court Noted Probable Jurisdiction on May 18, 1970.

CONSTITUTIONAL PROVISIONS AND ORDINANCE

The First and Fourteenth Amendments to the Constitution of the United States are Appendix A and Appendix B, respectively, to this Brief.

The ordinance involved is Cincinnati Ordinance, Section 901-L6. Loitering at Street Corners; it appears at page 498 of the 1956 edition of the Code of Ordinances of the City of Cincinnati:

> **Section 901-L6. Loitering at Street Corners.**
>
> It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

QUESTION PRESENTED

Constitutionality of the subject ordinance is the question presented. Overbreadth and vagueness are the features of these cases. The chilling effect of the language of the whimsically labeled "Loitering Ordinance" has been condemned by widely scattered Ohio courts. Those courts declared the language violative of First and Fourteenth Amendment concepts or they found from the facts of the cases that convictions could not be justified.

STATEMENT

The only facts revealed by the record are the status of Defendant Coates as a student involved in a demonstration (Appendix, p. 23) and of Defendants Hastings, Saylor, Adams and Wyner as pickets in a labor dispute (Appendix, p. 26). The cases are presented solely as to the constitutionality, on its face, of Cincinnati's Loitering Ordinance. The broad importance which attaches to the existence of the Ordinance is illustrated by the variety of its victims and the methods of its use. The argument which follows attempts to explain that importance.

SUMMARY OF ARGUMENT

The ordinance which makes "annoyance" a crime is vague. It could be useful for a government of men rather than a government of laws. Different men are susceptible to different levels of annoyance and thus must apply different standards to claimed violations.

The ordinance discriminates between persons who annoy as members of small groups (prohibited) and those who annoy as members of a public meeting of citizens (allowed but not defined).

Whoever merits the displeasure of a Cincinnati official is a fair target for this "catch-all" ordinance permitting arrest of those who, by the Ohio Court's definition in the majority opinion, irritate or provoke or trouble persons passing by.

The Loitering ordinance is used to excuse police transportation of nonconformists (to the jailhouse) from the immediate area where they have displeased or irritated or annoyed Cincinnati officialdom — it has come to symbolize repression, discrimination, intolerance and arrogance to the groups whose members have been charged with "loitering."

ARGUMENT

The conduct prohibited by the ordinance is vague and so imprecise of definition that a person is unable to determine what conduct, in which he may be engaged, will later be construed as being "annoying to persons passing by, or occupants of adjacent buildings." Various standards and levels of annoyance may, and certainly do, prevail from person to person and from group to group. Accordingly, no standard is established by which a person may know what conduct is annoying and no such determination can be made until the person who claims to be annoyed causes an arrest. The failure to establish a standard of prohibited conduct is in conflict with the requirement of due process.

Any legislative attempt to abrogate the right of individuals to assemble and associate together is prohibited by the Constitution even though the legislation is ostensibly motivated by a desire to insure peace and order in the community. *Thornhill* v. *Alabama* (1940), 310 U.S. 88; *Edwards* v. *South Carolina* (1963), 372 U.S. 229.

The terms of a penal statute defining an offense should

be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to punishment — such a requirement is consonant alike with ordinary notions of fair play and the settled rules of law. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the basic concept of due process of law.

The dissenting opinion in this case, points out (*Cincinnati* v. *Coates*, 21 Ohio St. 2d 66 at 70, Appendix, page 11) that the syllabus adopted by the majority does not contain all of the pertinent language of the ordinance. The dissent goes on to recognize the rules of construction which the United States Supreme Court has applied to penal statutes and recognizes that stricter standards of permissible statutory vagueness should be applied to an ordinance which has a potentially inhibiting effect upon rights guaranteed by the First Amendment of the Constitution. Also emphasized is the rule that a generally worded statute construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and the constitutionally impermissible applications. The dissent recognizes that the foregoing principles have been applied by the United States Supreme Court in decisions, among others, written in 1926, 1931, 1940, 1947, 1948 and 1959.

As the dissenting opinion points out (Appendix, page 13) the decision below approves "annoying" behavior which the ordinance allows at a public meeting of citizens but permits criminal conviction for "annoying" behavior under other circumstances, and never does explain what conduct is included.

Police who have the "annoying" tool available have a natural disinclination to exert the care and effort necessary to charge a wrongdoer with a specific offense. More importantly, they are tempted to ignore the constitutional protections guaranteed by the Bill of Rights and become truly Police State functionaries who exercise authority against those deemed to merit their displeasure or those who irritate their superiors. Note that the majority opinion below equates "annoy" with "irritate" (Appendix, page 10).

As the Judge of the Toledo, Ohio Municipal Court observed in 1960, when Williamsburg, Virginia was frequented in 1774 by "loiterers" who included Patrick Henry, Thomas Jefferson and Peyton Randolph, Governor Dunsmore could have made short shrift of our budding democracy by having his constables round up and imprison those of the Country's Founding Fathers who were causing an annoyance. *Toledo* v. *Sims*, 14 Ohio Opinions (2d) 66, 84 Ohio Law Abs. 476.

Some twenty years earlier the Common Pleas Court which has jurisdiction in the Cincinnati area had ruled on the language used in the Cincinnati ordinance and found it unconstitutional. The Judge in that case went as far back as 1603 to illustrate the restraints on freedom which are built into the Cincinnati Loitering Ordinance. He referred to the clan MacGregor which had incurred the wrath of King James VI of Scotland and had been prohibited "to assemble in greater numbers than four." The Ohio Judge noted that the Defendant in his case may have been as pestiferous in the eyes of the police as a MacGregor had been in the eyes of King James VI, but in view of the provisions of the Fourteenth Amendment, he reversed the conviction. *Deer Park* v. *Schuster*, 16 Ohio Opinions 485, 30 Ohio Law Abs. 466.

The Cleveland, Ohio area was temporarily relieved of fear of conviction for "annoyance" in 1968 when Judge Corrigan (who wrote the majority opinion in 1970 in *Cincinnati* v. *Coates*) wrote "Neither the Police or a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules or guide lines to govern its enforcement." *Cleveland* v. *Anderson*, 13 Ohio Appeals (2d) 83, 88-90 (Jurisdictional Statement, page 6).

The Supreme Court of Ohio held in 1962 that to permit a criminal conviction of the owner of a barking dog which was creating an annoyance was unconstitutional because the test was vague. "What degree of noise must there be to constitute an annoyance? Are noises included that would be annoying to a few sensitive people but would not disturb others?" *Columbus* v. *Becher*, 173 Ohio St. 197, at 199 (Jurisdictional Statement, page 6).

The Toledo case involved businessmen. The Deer Park case involved Halloween celebrants. The Cleveland case involved possible socialist sympathizers. The cases on appeal to this Court involve a student dissenter and union pickets. The Columbus case involved barking dogs.

In Cincinnati negroes have felt they are particularly susceptible to persecution by the Loitering Ordinance. Of course the Loitering Ordinance has nothing to do with loitering but rather is used to quell such activity as incurs the displeasure of the officials. The 1967 Cincinnati racial disturbances were to some degree connected with Police use of the Loitering Ordinance. A negro leader, Lathan Johnson, was effectively removed from his people and put to great distress in reversing the swift and sure conviction which followed his "loitering" arrest. As the Appellate Court found, he had been convicted of guilt by association. The unreported opinion in that case is Appendix C to

this Brief; a newspaper comment concerning the case is Appendix E in our Jurisdictional Statement. The community atmosphere and impact of the case appears in the Report of the National Advisory Commission on Civil Disorders, April 1968, The New York Times Edition, E. P. Dutton and Co., Inc., pages 47-50.

Probably the most unfair use of the ordinance is not for those who, until now, have invariably been able to get a dismissal or reversal on the facts if they persevered, but rather its use on the unsophisticated miscreants who, dragged off to the Police Station in the evening, plead guilty the next morning and thus have an established record for conviction of an ill-defined offense which may well have been, legally, no offense at all. Thus encouraged, lazy officers or, worse, malevolent officials, have less reason to adhere to the principles of law, order and justice which must necessarily prevail for the continuation of our form of government.

By leaving the whimsically labeled legislation in effect while doubting its constitutionality (see the statement to that effect in the Lathan Johnson opinion at page 16 of Appendix C herein) the lower courts permit use of the ordinance for harrassment of both the helpless miscreant who knows no better and the more erudite agitator – the distinction fades when the victim has been arrested and hauled away. Eventual acquital of the more sophisticated or more affluent defendant does not cure the lack of due process inherent in the detention for "annoyance."

This Court has often stated that legal devices which might be applied in a manner consistent with the Constitution may not be constitutionally capable of application where it would have the effect of inhibiting freedom of expression by making persons reluctant to exercise it. *Smith* v. *California,* 361 U.S. 147, 150. In appraising a

statute's inhibitory effect, this Court has not hesitated to take into account possible applications in a variety of factual contexts. The Court has recognized the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 433. The Court has found in most of the situations presented that an authoritative narrowing interpretation could not cure the vagueness. Saying the defendant could not be sent to jail for a crime he could not with reasonable certainty know he was committing, the Supreme Court disapproved a conviction following legislative committee questions with a vague purpose. *Scull* v. *Virginia, ex rel. Committee on Law Reform and Racial Activities* (1959), 359 U.S. 344.

Improper vagueness has been found in a prohibition to loiter or picket, *Thornhill* v. *Alabama* (1940), 310 U.S. 88; claimed breach of the peace by patriotic and religious songs, *Edwards* v. *South Carolina* (1963), 372 U.S. 229; prohibition against high prices, *United States* v. *Cohen Grocery Co.* (1921), 255 U.S. 81; prohibition against low wages, *Connally* v. *General Construction Co.* (1926), 269 U.S. 385; prohibition of being a gangster, *Lanzetta* v. *New Jersey* (1939), 306 U.S. 451; prohibition against disturbing the peace, *Ashton* v. *Kentucky* (1966), 384 U.S. 195 and *Terminiello* v. *Chicago* (1949), 337 U.S. 1; suggesting litigation, *N.A.A.C.P.* v. *Button* (1963), 371 U.S. 415; prohibition of use of public parks, *Wright* v. *Georgia* (1963), 373 U.S. 284; inhibiting the sale of books, *Smith* v. *California* (1959), 361 U.S. 147; requiring an oath by school teachers, *Cramp* v. *Board of Public Instruction* (1961), 368 U.S. 278; displaying sacrilegious films, *Joseph Burstyn, Inc.* v. *Wilson* (1952), 343 U.S. 495; dealing in stories of lust or crime, *Winters* v. *New York* (1948), 333

U.S. 507; and prohibiting display of a red flag, *Stromberg* v. *California* (1931), 283 U.S. 359.

The majority opinion of the Supreme Court of Ohio, in the cases here on appeal, complains that without a full transcript of the testimony no determination could be made of the particular conduct which was considered annoying. We submit that the annoying test is too broad, and that, as the dissenting opinion states, the only question for decision is the constitutionality, on its face, of the Cincinnati Loitering Ordinance. Not only was similar legislation declared unconstitutional, and soundly criticized, but an excellent recitation of the persuasive reasons and the authorities therefore was presented in the Louisville, Kentucky decision of *Baker* v. *Bindner* (1967), 274 Fed. Supp. 658.

CONCLUSION

We urge that The Supreme Court of Ohio has upheld legislation which is unconstitutional because of vagueness and overbreadth as described in *Lanzetta* v. *State of New Jersey*, 306 U.S. 451 and Harvard Law Review, February, 1970, page 844, and which lends itself to ready use by officials against those deemed to merit their displeasure, *Thornhill* v. *State of Alabama*, 310 U.S. 88, and should be reversed.

Respectfully submitted,

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Cincinnati, Ohio 45202
Counsel for Appellants

APPENDIX A

UNITED STATES CONSTITUTION AMENDMENTS

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX B

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State,

or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY

No. 10532

CITY OF CINCINNATI,
Plaintiff-Appellee,

vs.

LATHAN JOHNSON,
Defendant-Appellant.

OPINION

August 19, 1968

APPEAL ON QUESTIONS OF LAW
FROM COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. William A. McClain, Ralph E. Cors and Simon L. Leis, Jr., for Plaintiff-Appellee,

Messrs. Beckman, Lavercombe, Fox & Weil, Robert R. Lavercombe of counsel, for Defendant-Appellant.

DOYLE, J.

The appellant, Lathan Johnson, was convicted and sentenced in the Municipal Court of Cincinnati for the

violation of Section 901-L6 of the Code of Ordinances of the city. The ordinance is as follows:

> "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00) or be imprisoned not less than one (1) nor more than thirty (30) days or both."

Assignments of error are presented as here shown:

> "1. The ordinance under which the defendant was convicted is unconstitutional."
> "2. The judgment of the court was not sustained by sufficient evidence and is contrary to law."
> "3. The court erred in imposing a maximum sentence."
> "4. The trial court's pre-trial statements raised a question as to the possibility of defendant receiving a fair trial."

A brief summary of pertinent facts as gleaned from the record of testimony may be stated, to wit: In the evening of June 12, 1967, civil disturbances commenced in the Cincinnati area, which increased to the intense quality of severe riots in the several days following. Police officers were dispatched, on June 12th, to the troublesome area to quell the disturbances and to attempt to prevent an incipient riot. Several hundred persons were observed on the street and sidewalks; bottles and rocks were being thrown and the police were subjected to verbal abuse. Shortly thereafter, a police order was issued to disperse the crowd and to clear the people from the streets and sidewalks. A group of officers in block or line formation,

while proceeding on one of the streets, encountered a good size group of violently aroused people. As the officers advanced, the crowd moved back, excepting only the appellant, Lathan Johnson, who remained standing on the sidewalk. He was told to move on and, upon his refusal to comply with the order of the police, he was arrested. He was given amply opportunity to avoid arrest by walking elsewhere.

The appellant was a professional social worker, and the evidence shows only that he had gone to the troublesome area to assist in preserving order. He testified: "* * * I walked behind the group and stood there, and then I turned to begin helping get the kids off the street because supposedly there was a fear that someone was going to try to confront the police, and we did not want any of the kids to get hurt because the guns were already out and there was a lot of this milling around and there was a lot of uncertainty * * *; and then the group that I was working with to get the kids off the street had seemingly — we had seemingly gotten it quiet; and then all of a sudden * * * came this phalanx of police."

The police officer who made the arrest testified that, as the crowd moved on under police orders, he saw the appellant emerge from the crowd. He was then told: "You'll have to leave this area now because of the condition of what's going on here." The appellant did not reply, nor did he move on. Whereupon, the officer said: "Will you leave" or "Are you going to leave"; receiving no reply to these questions, the officer repeated the request a third time, whereupon the appellant replied, "Why?" In reply, the officer said: "Well, you'll have to be placed under arrest because we can't allow anyone to stand here." The testimony of the officer continues:

"Q After placing him under arrest, what did you then do with him?"

"A I took him by the arm and I escorted him across Burnet Avenue to the lot, to the patrol wagon which I had placed in back of the parking lot * * *. When I reached this area, I asked him if he had any weapon on him, and he said, 'Well that's for you to find out' * * * and I frisked him. He didn't have any weapons on him. I placed him in the patrol wagon."

The offense charged under the ordinance is that the appellant was one of three, or more, persons assembled on a street or sidewalk, who were conducting themselves in a manner annoying to persons passing by or annoying to occupants of adjacent buildings. A careful reading of the entire record reveals that the case of the prosecution is subject to the infirmities of proof by imputation. The evidence does not establish the fact that the appellant, as a part of the lawless group, annoyed anyone except, perhaps, the officer who made the arrest after the crowd was dispersed. The only evidence of probative worth accounting for the appellant's presence is that shown by his own testimony. It may be fairly said that the unruly mob of persons did conduct themselves in such a manner as to violate the language of the ordinance; however, to find this appellant a part of the mob would require this Court to say that he was guilty by association only. This doctrine has no place in this case.

It may be that the appellant was in violation of other ordinances, but we are concerned now only with the violation of the ordinance set out above.

While we have grave doubt of the constitutionality of this ordinance, we prefer not to pass upon that question in this case. We confine our judgment to a failure of proof,

and will, therefore, on that basis, reverse and enter final judgment for the appellant.

Reversed and final judgment for appellant.

GUERNSEY, P.J. and HUNSICKER, J., CONCUR.

GUERNSEY, P.J. OF THE THIRD APPELLATE DISTRICT, HUNSICKER AND DOYLE, J.J. OF THE NINTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

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TABLE OF AUTHORITIES

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vs.

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Appellee

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July 22, 1970

Robert C. Grimes
Notary Public, within and for Hamilton County, Ohio
ROBERT C. GRIMES
Notary Public, Clermont & Hamilton Counties, Ohio

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1370

DENNIS COATES, et al.,

Appellants,

vs.

CITY OF CINCINNATI,

Appellee.

Appeal From The Supreme Court of Ohio

BRIEF OF APPELLEE

OPINION BELOW

The opinion of the Supreme Court of Ohio is reported in 21 Ohio St. 2d 66 (Appendix, page 7).

JURISDICTION

This is an appeal from the final judgment of the Supreme Court of the State of Ohio entered January 28, 1970, affirming the decision of the Court of Appeals for the First Appellate District of Ohio on February 4, 1969, which affirmed the judgment of the Hamilton County Municipal Court rendered on March 29, 1968. Probable Jurisdiction was noted on May 18, 1970.

CONSTITUTIONAL PROVISIONS AND ORDINANCE

UNITED STATES CONSTITUTION AMENDMENTS

AMENDMENT I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Sections 2, 3, 4 and 5 omitted).

CINCINNATI CODE OF ORDINANCES

Section 901-L6 Loitering at Street Corners.

It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both.

QUESTION PRESENTED

Whether Cincinnati Code of Ordinances Section 901-L6, prohibiting three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings, violates the First and Fourteenth Amendments to the Constitution of the United States?

STATEMENT

There is no bill of exceptions. Appellants bring this appeal solely from the provisions of Cincinnati Code of Ordinances Section 901-L6.

ARGUMENT

The First Amendment Right Of Assembly Is Conditional And Not Absolute

Appellants contend the First and Fourteenth Amendments to the Constitution of the United States guarantee their right of assembly and prohibit government from enacting any law respecting citizen assembly.

Your Appellee does not agree.

The First Amendment to the Constitution, made applicable to the several states of the nation through the Fourteenth Amendment, in part, provides:

> "Congress shall make no law . . . abridging . . . the right of the people *peaceably to assemble,* and to petition the Government for a redress of grievances." (emphasis supplied).

The First Amendment does not provide an absolute right of assembly. The right of assembly is conditional. The

condition is that the people assemble and conduct themselves *peaceably*. The proposition presented is not new to the court. In *Cox* v. *Louisiana*, 379 U.S. 536 (1965) this court emphatically rejected the notion that the First and Fourteenth Amendments afford the same kind of freedom respecting conduct as these amendments afford to speech. The court reaffirmed this position in *Gregory* v. *Chicago*, 394 U.S. 111 (1969) saying the Federal Constitution does not bar enactment of laws regulating conduct, if such laws specifically bar only the conduct deemed obnoxious and are carefully and narrowly aimed at that forbidden conduct.

The Cincinnati Ordinance Meets The Test Of Constitutionality

We humbly suggest the Cincinnati Ordinance challenged by appellants meets the test of constitutionality. The gravamen of appellants complaint concerns the use of the term "annoying" to describe the *conduct* prohibited by the ordinance. Appellants suggest the term is vague and imprecise. We urge that the term "annoying" is not vague, imprecise, nor a term which requires reasonable men of common intelligence and understanding to guess at its meaning. There are some men who will never understand that which meets their purpose not to understand. The Constitution does not require impossible standards of legal draftsmanship. What is required is that laws be drafted so men of common intelligence, who would be law-abiding, can determine with reasonable precision what acts it is their duty to avoid. *United States* v. *Petrillo*, 332 U.S. 1 (1947).

The Terms Of The Cincinnati Ordinance Are Precise

The Cincinnati Ordinance is drafted with reasonable precision when examined against the First Amendment

provisions which grant the right of the people to peaceably assemble. The choice and use of the term annoying in the Cincinnati Ordinance was no mistake. Annoying is the antonym of peaceably. Peaceably is defined by Webster's Third New International Dictionary of the English Language Unabridged (1964) at page 1660 to mean "without subjection to annoyance". Respectfully we suggest to the court that if peaceably is a term of common understanding to describe First Amendment conduct which is protected against legislative limitation and peaceably means without subjection to annoyance; then the opposite of peaceably is annoying, a term equally capable of common understanding to described that conduct which is prohibited and unprotected by the provisions of the First Amendment.

When this cause was before the Supreme Court of Ohio, that court, in its written opinion, (Appendix, page 10) said:

> "The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate."

We conclude that the common and wide usage of the term annoying; its definition in commonly accepted and used dictionaries of the English language leads no man astray when determining what conduct is prohibited.

Just as those who drafted the First Amendment used the term "peaceably" to describe that conduct which is protected at public assemblies; those who drafted the Cincinnati Ordinance carefully selected the term "annoying" to describe that conduct which is the opposite of peaceably and not protected by the United States Constitution.

CONCLUSION

We respectfully submit, in conclusion, that Section 901-L6 of the Cincinnati Code of Ordinances, should be upheld and held to be constitutional, and the findings of guilty of the appellants herein be sustained, and that the convictions be affirmed.

Respectfully submitted,

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Cincinnati, Ohio 45202

Counsel for Appellee.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COATES ET AL. *v.* CITY OF CINCINNATI

ON APPEAL FROM THE SUPREME COURT OF OHIO

No. 117. Argued January 11, 1971—Decided June 1, 1971

Cincinnati, Ohio, ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ," which has not been narrowed by any construction of the Ohio Supreme Court, *held* violative on its face of the due process standard of vagueness and the constitutional right of free assembly and association. Pp. 3–6.

21 Ohio St. 2d 66, 255 N. E. 2d 247, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, HARLAN, BRENNAN, and MARSHALL, JJ., joined. BLACK, J., filed a separate opinion. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 117.—October Term, 1970

Dennis Coates et al., Appellants, v. City of Cincinnati. } On Appeal From the Supreme Court of Ohio.

[June 1, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ."[1] The issue before us is whether this ordinance is unconstitutional on its face.

The appellants were convicted of violating the ordinance, and the convictions were ultimately affirmed by a closely divided vote in the Supreme Court of Ohio, upholding the constitutional validity of the ordinance. 21 Ohio St. 2d 66. An appeal from that judgment was

[1] "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both." Section 901-L6, Code of Ordinances of the City of Cincinnati (1956 ed.).

brought here under 28 U. S. C. § 1257 (2),[2] and we noted probable jurisdiction, 398 U. S. 902. The record brought before the reviewing courts tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution. Cf. *Times Film Corp.* v. *Chicago*, 365 U. S. 43.

In rejecting this claim and affirming the convictions the Ohio Supreme Court did not give the ordinance any construction at variance with the apparent plain import of its language. The court simply stated:

> "The ordinance prohibits, *inter alia*, 'conduct . . . annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.
>
> "We conclude, as did the Supreme Court of the United States in *Cameron* v. *Johnson*, 390 U. S. 611, 616, in which the issue of the vagueness of a statute was presented, that the ordinance 'clearly and precisely delineates its reach in words of common understanding. It is a "precise and narrowly drawn regulatory statute [ordinance] evincing a legislative

[2] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

judgment that certain specific conduct be . . . proscribed.'" 21 Ohio St. 2d, at 69.

Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." *Ibid.* But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.[3]

We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because

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[3] Cf. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, where this Court upheld a statute which punished "offensive, derisive or annoying" words. The state courts had construed the statute as applying only to such words "as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." The state court also said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace." This Court was "unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression." 315 U. S., at 573.

it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391.

It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of anti-social conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. *Gregory* v. *Chicago*, 394 U. S. 111, 118, 124–125 (concurring opinion of MR. JUSTICE BLACK). It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.[4]

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[4] In striking down a very similar ordinance of Cleveland, Ohio, as constitutionally invalid, the Court of Appeals for Cuyahoga County said:

"As it is written, the disorderly assembly ordinance could be used to incriminate nearly any group or individual. With little effort, one can imagine many . . . assemblages which, at various times, might annoy some persons in the city of Cleveland. Anyone could become an unwitting participant in a disorderly assembly, and suffer the penalty consequences. It has been left to the police and the courts to decide when and to what extent ordinance Section 13.1124 is applicable. Neither the police nor a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to

But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. See *Street* v. *New York*, 394 U. S. 576, 592; *Cox* v. *Louisiana*, 379 U. S. 536, 551–553; *Edwards* v. *South Carolina*, 372 U. S. 229, 238; *Terminiello* v. *Chicago*, 337 U. S. 1; *Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *Schneider* v. *State*, 308 U. S. 147, 161. The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct.[5] And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their

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regulate conduct does not lay down ascertainable rules and guidelines to govern its enforcement. This ordinance represents an unconstitutional exercise of the police power of the city of Cleveland, and is therefore void." *Cleveland* v. *Anderson*, 13 Ohio App. 2d 83, 90.

[5] In striking down a very similar ordinance of Toledo, Ohio, as constitutionally invalid, the Municipal Court of that city said:

"Under the provisions of Sections 17–5–10 and 17–5–11, arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoyance of Governor Dunsmore and his colonial constables." *City of Toledo* v. *Sims*, 14 Ohio Op. 2d 66, 69.

ideas, their lifestyle or their physical appearance is resented by the majority of their fellow citizens.[6]

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

The judgment is reversed.

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[6] The alleged discriminatory enforcement of this ordinance figured prominently in the background of the serious civil disturbance that took place in Cincinnati in June 1967. See Report of the National Advisory Commission on Civil Disorders, at 26–27 (1968).

SUPREME COURT OF THE UNITED STATES

No. 117.—October Term, 1970

Dennis Coates et al., Appellants, v. City of Cincinnati. } On Appeal From the Supreme Court of Ohio.

[June 1, 1971]

Mr. Justice Black.

First. I agree with the majority that this case is properly before us on appeal from the Supreme Court of Ohio.

Second. This Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face. *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939). *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921). Likewise, laws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother White states in his opinion (with which I substantially agree), this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which forbids the State to abridge freedom of

speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate. This difficulty has been aggravated in this case, because the record fails to show in what conduct these defendants had engaged to annoy other people. In my view, a record showing the facts surrounding the conviction is essential to adjudicate the important constitutional issues in this case. I would therefore, vacate the judgment and remand the case to the court below to give both parties an opportunity to supplement the record so that we may determine whether the conduct actually punished is the kind of conduct which it is within the power of the State to punish.

SUPREME COURT OF THE UNITED STATES

No. 117.—October Term, 1970

Dennis Coates et al., Appellants, v. City of Cincinnati. } On Appeal From the Supreme Court of Ohio.

[June 1, 1971]

Mr. Justice White, with whom The Chief Justice and Mr. Justice Blackmun join, dissenting.

The claim in this case, in part, is that the Cincinnati ordinance is so vague that it may not constitutionally be applied to any conduct. But the ordinance prohibits persons from assembling with others and "conduct[ing] themselves in a manner annoying to persons passing by...." Cincinnati Code of Ordinances § 901–L6. Any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say that these and many other kinds of conduct are not within the foreseeable reach of the law.

It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.

In *Williams* v. *United States*, 341 U. S. 97 (1951), a police officer was charged under federal statutes with extracting confessions by force and thus, under color of law, depriving the prisoner of rights, privileges, and immunities secured or protected by the Constitution and laws of the United States, contrary to 18 U. S. C. § 242. The defendant there urged that the standard—rights, privileges, and immunities secured by the Constitution—was impermissibly vague and, more particularly, that the Court was often so closely divided on illegal confession issues that no defendant could be expected to know when he was violating the law. The Court's response was that, while application of the statute to less obvious methods of coercion might raise doubts about the adequacy of the standard of guilt, in the case before it, it was "plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause." *Id.*, at 101. The claim of facial vagueness was thus rejected.

So too in *United States* v. *National Dairy Prod. Corp.*, 372 U. S. 29 (1963), where we considered a statute forbidding sales of goods at "unreasonably" low prices to injure or eliminate a competitor, 15 U. S. C. § 13a, we thought the statute gave a seller adequate notice that sales below cost were illegal. The statute was therefore not facially vague, although it might be difficult to tell whether certain other kinds of conduct fell within this language. We said: "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Id.*, at 33. See also *United States* v. *Harriss*, 347 U. S. 612 (1954). This approach is consistent with the host of cases holding that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other

persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960), and cases there cited.

Our cases, however, including *National Dairy*, recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment. See *United States* v. *Robel*, 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Kunz* v. *New York*, 340 U. S. 290 (1951). Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492 (1965). The statute, in effect, is striken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. See *United States* v. *National Diary Prod. Corp., supra*, at 36.

Even accepting the overbreadth doctrine with respect to statutes clearly reaching speech, the Cincinnati ordinance does not purport to bar or regulate speech as such. It prohibits persons from assembling and "conduct[ing]" themselves in a manner annoying to other persons. Even if the assembled defendants in this case were demonstrating and picketing, we have long recognized that picketing is not solely a communicative endeavor and has aspects which the State is entitled to regulate even though there is incidental impact on speech. In *Cox* v. *Louisiana*, 379 U. S. 559 (1965), the Court held valid on its face a statute forbidding picketing and parading near a courthouse. This was deemed a valid

regulation of conduct rather than pure speech. The conduct reached by the statute was "subject to regulation even though [it was] intertwined with expression and association." *Id.*, at 563. The Court then went on to consider the statute as applied to the facts of record.

In the case before us, I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information from this record as to what conduct was charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core.

I would therefore affirm the judgment of the Ohio court.